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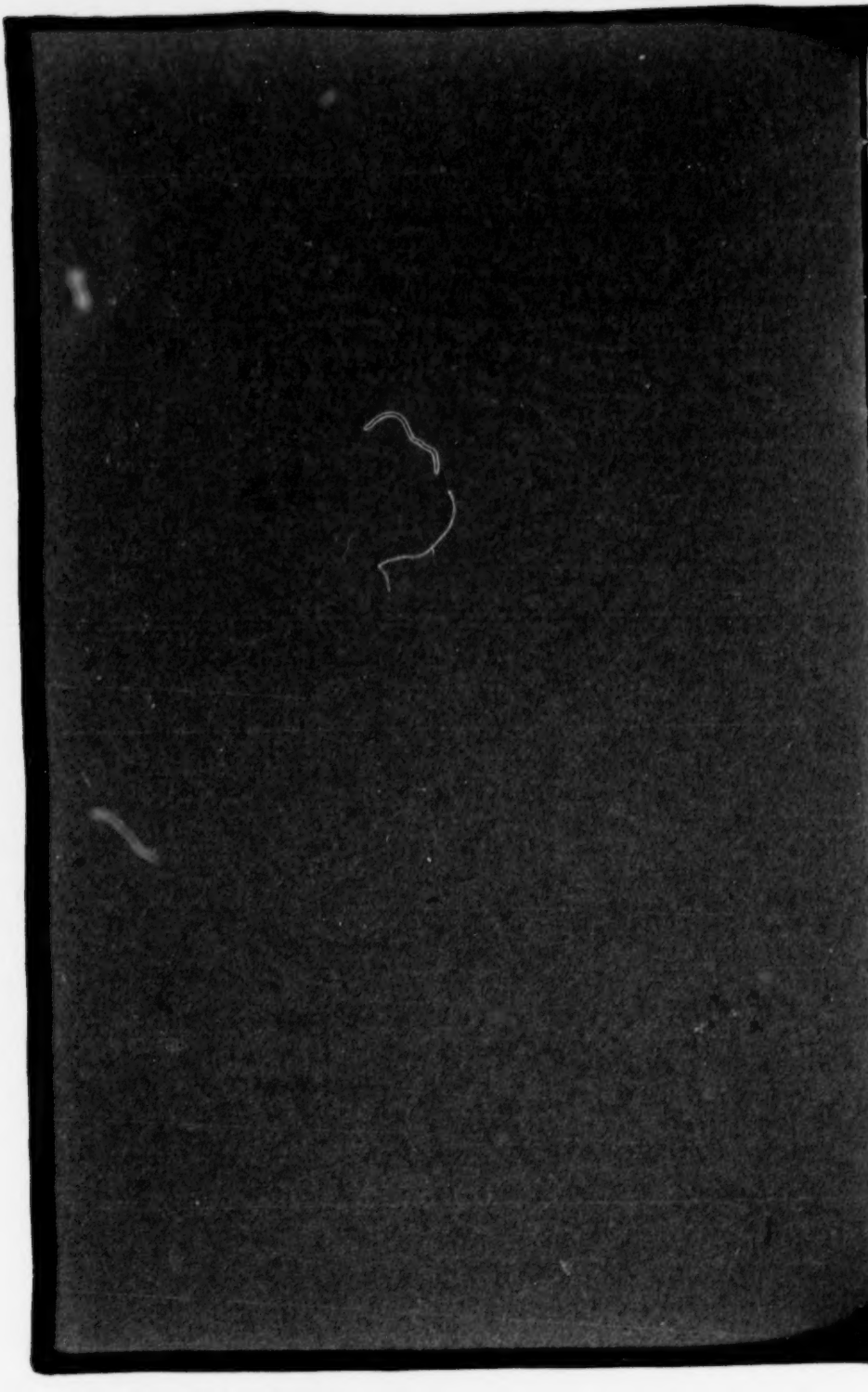

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SUPREME COURT OF THE STATE OF COLORADO

No. 15343

WILLIAM F. McGLONE AND CONTINENTAL CASUALTY COMPANY, A CORPORATION,
Plaintiffs in Error,

vs.

CITY AND COUNTY OF DENVER, A MUNICIPAL CORPORATION,
Defendant in Error

Error to the District Court in and for the City and County of Denver

Honorable HENRY A. HICKS, *Judge*

ON APPLICATION FOR ALLOWANCE OF AN APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO TO THE SUPREME COURT OF THE UNITED STATES.

STATEMENT PARTICULARLY DISCLOSING THE BASIS UPON WHICH IT IS CONTENDED BY DEFENDANT IN ERROR (APPELLANT) THAT THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION UPON APPEAL TO REVIEW THE JUDGMENT OF THE SUPREME COURT OF COLORADO AS REQUIRED BY RULE 12 OF THE SUPREME COURT OF THE UNITED STATES.

Pursuant to paragraph 1, Rule 12 of the Supreme Court of the United States, Defendant in Error-Appellant presents and files this its statement particularly disclosing the

basis upon which it is contended by it that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment of the Supreme Court of the State of Colorado desired to be appealed from:

A

Statutory Provision Sustaining Jurisdiction

The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States on appeal is the Act of February 13, 1925, Chapter 229, Section 1 (43 Stat. 937; Judicial Code, Section 237; 28 U. S. C. A., Section 344), which provides that:

> "A final judgment or decree in any suit in the highest court of the state in which a decision in the suit could be had, * * * where is drawn in question the validity of any statute of any state on the ground of its being repugnant to the Constitution * * * of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such state court and may, in its discretion, award execution or remand the cause to the court from which it was removed by writ. * * * "

As amended by the Act of January 31, 1928, c. 14, Secs. 1 and 2 (45 Stat. 54), as amended April 26, 1928, c. 440, 45 Stat. 466 (28 U. S. C. A., Secs. 861-A and 861-B) which respectively provide:

> Section 861-A:
>
> "The writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal."

Section 861-B:

"The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of revoking such relief, including the provisions relating to costs, supersedeas and mandate, shall be applicable to the appeal which the preceding section substitutes for a writ of error."

B

Statute of the State of Colorado, the Validity of Which Is Involved

The statute of the State of Colorado, the validity of which is involved, is a pretended Order of the Board of Water Commissioners of the City and County of Denver, State of Colorado, in favor of the validity of which the Supreme Court of Colorado has decided, and that consists of three certain letters that were construed and applied by the opinion and decision of said Court as constituting a valid order, law or statute of the State of Colorado, which was drawn in question by the City on the ground of its repugnancy to the United States Constitution, and which are in words and figures, as follows:

"EXHIBIT C

November 24, 1930.

Kountze Brothers,
New York City, N. Y.

GENTLEMEN:

We find that the funds to cover the interest coupons on the Denver Municipal Refunding Water Bonds, Series 1927, due December 1st, have not been forwarded to you, as per your letter of August 3rd, 1927, 15 days prior to the interest paying date.

We are sorry this instalment was overlooked and will assure you that in the future the funds will be there in proper time.

Very truly yours,

BOARD OF WATER COMMISSIONERS

GFH

Assistant Manager"

GFH.

(Record page 63, folio 240.)

"EXHIBIT D

Commissioners: A. P. Gumlick, W. H. Leonard, Fred'k R. Ross, Richard Wensley.

Officers: W. H. Leonard, President; Fred'k R. Ross, Vice Pres.; A. P. Gumlick, Vice Pres.; C. C. Schrepferman, Mgr.; Hiram E. Hiltz, Sec.-Treas.

CITY AND COUNTY OF DENVER BOARD OF WATER COMMISSIONERS

1509 Cleveland Place

Telephone—Tabor 8211

November 24, 1930.

Hon. Clem W. Collins,
City Treasurer,
Denver, Colorado

DEAR SIR:

We are enclosing a copy of a letter from Kountze Brothers dated August 3rd, 1927, relative to the payment of interest on Denver Municipal Refunding Water Bonds, Series 1927, and also a copy of a letter we are this day writing to them.

Will you please be governed accordingly?

Very truly yours,

BOARD OF WATER COMMISSIONERS,
G. F. HUGHES,
Assistant Manager."

GFH/oab.

(Record page 64, folio 241.)

"EXHIBIT E

KOUNTZE BROTHERS

New York, August 3, 1927.

Mr. Hiram E. Hilts,
Sec'y of the Board of Water Commissioners,
City of Denver, Colorado.

DEAR SIR:

We are advised by our valued correspondents, the Colorado National Bank of Denver, that you contemplate a refunding issue of Water Bonds to the extent of about $14,000,000.00.

We shall be very pleased indeed to have our firm named as fiscal agents for the payment of the interest on these bonds in New York, for which service we will name the same terms under which we are now acting in a similar capacity for the City and County of Denver, Colorado; that is, if funds to pay this interest are placed with us fifteen days prior to the maturity of the coupons, we will make no commission charge for paying these obligations.

Trusting these terms will prove entirely satisfactory, and awaiting your further advices concerning the particulars of the issue in question, we remain

Yours truly,

KOUNTZE BROS."

(Record page 65, folio 242.)

C

Date of Judgment Sought to Be Revised and Date of Presentation of Application for Appeal

The judgment of the Supreme Court of Colorado desired to be appealed from was entered on the 26th day of November, 1945, and the application for appeal is presented and filed this 20th day of February, 1946.

D

Nature of Case

(Herein the plaintiffs in error will be referred to as "McGlone" and the "Company," and defendant in error as the "City.")

This is a civil action wherein the City, a municipal corporation of the State of Colorado, sued McGlone and the Company for damages in the sum of $25,997.50, with interest, for the breach of an official bond executed by them to secure the faithful and prompt performance by McGlone of his official duties as Manager of Revenue, ex-officio Treasurer of said city (Record pages 1-4, folios 1-11).

Said bond is the general bond of said McGlone as such Manager of Revenue, ex-officio Treasurer, and was executed in pursuance of and in literal compliance with Section 57 (Sec. 105 of the 1927 Edition) of the City Charter, which provides:

> "Bond-Surety Company—Cost paid by city
>
> (Section 57) The treasurer shall give a bond to the city and county with sufficient sureties, which sureties shall be responsible surety companies, to be approved by the mayor and council, in the sum of five hundred thousand dollars, and for such additional sum as the mayor and council shall require, conditioned as required by the general statutes relating to bonds of county treasurers and as may be further required by ordinance, and for paying over to his successor in office all such sums of money belonging to the city and county as shall be in his hands, and to account for and turn over to his successor all moneys deposited with him for any cause whatsoever, and all city and county property which may come to his hands.
>
> The cost of said bond shall be borne by the city and county, to be audited, allowed and paid out of the

treasury as provided for the payment of other general expenses.

(Charter, March 29, 1904.)"

(Record pages ——, folios ——.)

The breaches of said bond that are alleged in the complaint are that:

(a) "Said McGlone in breach of the terms and conditions of his said bond converted" said sum of $25,997.50 "to his own use"; and

(b) "That said McGlone has failed and refused and still fails and refuses to account for said sum of money or any part thereof, or to pay or deliver over the same to his successor in office or to any other person or persons authorized by law to received the same."

(Record pages 3, folios 7-9.)

In their answer said defendants admitted that McGlone had during his term of office received various sums aggregating said sum of $25,997.50, but denied having converted that or any other sum to his own use (record pages 7-14, folios 7-17); admitted that, following the same procedure as had been followed by his predecessor in office, and in manner and form as directed by the Board of Water Commissioners of said city, he had remitted said moneys to Kountze Brothers Bank in New York to cover and pay certain coupons on municipal water bonds; that the Banking House of Kountze Brothers in New York City failed and closed; that there was at the time of the closing of said bank an insufficient amount of money in each coupon account to cover coupons overdue, much less those maturing thereafter, and which the defendant had reason to believe would be presented to said Kountze Brothers for payment; and that the balances in said bank were not applied to the pay-

ment of coupons or returned due to the failure of said Kountze Brothers Bank (record pages 18-21; 79, folios 30-38; 207).

The only defenses that said defendants even pretended to make to the allegations of the complaint in said cause were that pursuant to Section 264D (297B of the 1927 Edition) of the City Charter, a Board of Water Commissioners was created which had and has complete charge and control of a municipal water works system and plant for supplying the city and its inhabitants with water for all uses and purposes; that payment of the indebtedness evidenced by certain bonds mentioned in said answers, and interest thereon, and the cost of operation and maintenance of said system and plant and all additions, extensions and betterments thereto, have at all times been and now are made from revenues received from the operation of said system and plant by said board, and that the revenues so received from the operation of said system and plant were turned over to the Treasurer of said City and County pursuant to Section 264 D (Section 297 B of the 1927 Edition) of the Charter, and by said Treasurer placed in a separate account or accounts constituting the water works funds hereinbefore mentioned (Record pages 15-16, folios 20-23); that in pursuance of the Charter of the City its Council had in three certain ordinances submitted to the taxpaying electors thereof for their approval, the question of issuing negotiable interest bearing bonds as follows:

> "First—for the acquisition of a new municipal water plant
>
> Second—for the purpose of supplying the City with water; and
>
> Third—for the purpose of refunding certain outstanding bonds described as City and County of Denver Municipal Water Bonds;"

that said ordinances respectively provided that the Council should by subsequent ordinances prescribe the form of the bonds and authorize the issue, if the issue should be ratified by the properly qualified taxpaying electors; that they were so duly authorized and said bonds were duly issued; that the principal and interest of said bonds were by said ordinances respectively made "payable AT the said Banking House of Kountze Brothers, in the City of New York, or AT the office of the Treasurer of the City or County of Denver at the option of the bondholders and the bonds and interest coupons themselves so provided" (Record pages 28-30, folios 61-67).

In addition to the foregoing admissions, denials and allegations that were contained in the first and second defenses of the answer of McGlone, and that were in substance adopted by the Company, its answer contained in substance the following:

Pursuant to Section 264 D (297 B of the 1927 Edition) of the City Charter, the Board of Water Commissioners required McGlone, as treasurer or custodian of the water works fund and the revenue received by the Board of Water Commissioners from the operation of the water plant and system, to give a SPECIAL bond conditioned in the manner determnied by said board; that McGlone as principal, and Fidelity & Deposit Company of Maryland, as surety, made, executed and delivered to the city their bond or obligation in writing, a copy of which was attached to and made by reference a part of said answer, marked Exhibit A (Record pages 56-57, folios 144-145).

That said bond was required and given pursuant to Section 264 D of the Charter as a SPECIAL bond to cover the moneys in the water works fund; the items referred to and included in the plaintiff's complaint were each and all water works funds and relate solely to the bonds issued by the

City for the purchase and on account of said water works system and plant and its operation, maintenance and the additions, extensions and betterments thereto; that the bond of the defendant Continental Casualty Company, sued upon herein, is, and is intended to be, a general bond covering the defendant McGlone as Treasurer of the City and County of Denver, but *not as Treasurer of the Water Board,* and the items of water bond coupon accounts are not covered by and were not intended to be covered by the said bond (Record page 57, folio 147).

That the City had elected to and made demand on said special bond and brought suit thereon against said Fidelity & Deposit Company of Maryland and said McGlone, which suit was then pending in the District Court of said City and County of Denver (R. p. 58; F. 148).

That if it shall be determined that the defendant Continental Casualty Company is liable for the payment of said items of water bond coupon accounts the said Continental Casualty Company is entitled to become and be subrogated to the rights of the City on the special bond of Fidelity & Deposit Company of Maryland and in the suit pending therein (R. p. 58 F. 150).

That if in said suit it shall be determined that said Fidelity & Deposit Company of Maryland is liable for the payment of said items and judgment therefor be decreed and satisfaction be had by the City, no liability would exist on the bond of or against the defendant Continental Casualty Company herein for said items and this action should be abated and denied prosecution pending determination of said cause against said Fidelity & Deposit Company of Maryland (Record page 59, folio 152).

Thereafter, by leave of Court first had and obtained, both of said defendants—McGlone and the Company—filed supplemental answers in which they alleged, in substance,

that the City for a valuable consideration, in a transaction in which the defendant Continental Casualty Company was not a party, had released and discharged McGlone and Fidelity & Deposit Company of Maryland and that said suit against them had been settled; that the claim or claims in that suit were the same and identical claims made by plaintiff in its complaint herein; that said Fidelity & Deposit Company had brought suit against the Continental Casualty Company upon the same claims and demand as are alleged and made by the plaintiff against said Company herein, and reiterated the allegation that "the bond of the defendant Continental Casualty Company is, and is intended to be, a general bond covering the defendant McGlone as Treasurer of the City and County of Denver, but not as Treasurer of said water board, and said items of water bond coupon accounts are not covered by and were not intended to be covered by said general bond" (Record pages 64-65, 68-86, folios 166-172, 176-183).

The City filed motions to strike all of the defenses so alleged excepting such parts thereof as admitted material allegations contained in the complaint. When said motions were set and came on for hearing the attorney appearing for said defendants suggested that said causes be tried upon an agreed statement of facts which he offered to prepare and submit to the attorney for the City for approval within one week. The hearing was continued for that reason. Said attorney having failed in that respect for a period of more than one year, said motions were reset for hearing, but no such proposed "agreed statement of facts" was submitted to the attorney for the City until said motions came on for hearing in open court. At that time said attorney for defendants for the first time presented to the attorney for the City for his examination and approval the instrument that appears at pages 73-86, folios

188-227, of the record, and which, as said record shows, is a substantial reiteration of facts alleged in said answers, with the exception that the defenses of release and discharge and for subrogation set forth in said supplemental answers were dropped out, evidently on account of the provisions of Sections 4, 5 and 6, Chapter 92, Colorado Stat. Ann. 1935, which so plainly justified the compromise and settlement of the action against McGlone and Fidelity & Deposit Company of Maryland and support both the right of that company to contribution against the Continental Casualty Company and the right of the City to an affirmance of the judgment of the Trial Court in this case.

Thereupon the attorney for the City refused to sign or agree to said proposed statement of facts as the same was proposed, and the record plainly shows the following as respects the only issues of fact and of law that were actually presented in said cause for decision:

(1) That the defendants submitted an instrument entitled "Agreed Statement of Facts," which, as proposed, the City refused to agree to or sign; that thereupon the defendants submitted the same as a basis for trial and offered to prove the facts objected to and for the Court to reserve its rulings; at the request of counsel for the defendants the case was proceeded with upon the distinct understanding that it should be tried on said statement irrespective of signature, subject to the objections of counsel for the City to any facts stated therein and ruling would be reserved; that the City objected to parts of paragraphs 12 and 12A and to all of paragraphs 24, 25 and 31 of said instrument, "on the grounds of immateriality and irrelevancy and in part as mere conclusions"; that the Court received said instrument in evidence subject to said understanding, and necessarily sustained said objections when, after being

fully advised, it gave judgment for the plaintiff for the full amount of principal and interest called for by its complaint.

(2) That the only issue presented in said cause for decision is according to the language of the defendants in paragraph 8 of said instrument, as follows:

> "The plaintiff claims in this suit that defendant McGlone as principal and the defendant Continental Casualty Company as surety are jointly and severally liable to it for the payment or reimbursement of the sums deposited in Kountze Brothers Bank and not recovered in the bankruptcy proceedings, but the defendants deny liability and this suit is upon the issue of the liability so claimed and denied."
> (Record page 75, folio 195.)

(3) That the defendants admitted that said McGlone deposited said moneys in said bank and that because of the failure thereof said moneys were lost and not returned or paid over to his successor in office.

(4) That apart from said admissions the only pretended defenses to said action that defendants undertook to plead were that the said bond was required and given pursuant to Section 264D (297 B of the 1927 Edition) of the municipal Charter of the City and County of Denver, as a special bond to cover the moneys in the water works fund; that the items referred to and included in the plaintiff's complaint and bill of particulars as water bonds, coupon account 1914, 1923 and 1927, were each and all water works funds and related solely to the bonds issued by the City and that as alleged in Paragraph X of McGlone's answer and in Paragraph 24 of said so-called "Agreed Statement of Facts" that was objected to by the City, "the Board of Water Commissioners prior to the transmittal of the moneys involved in this suit authorized and directed the Department of Revenue ex-officio Treasurer and also directed the Manager

of Revenue to transmit said moneys to the said Kountze Brothers Banking House AT New York to take care of the payment of all the bond interest coupons that might be there presented and the said moneys were transmitted by the defendant McGlone and his predecessors in obedience to the orders and directions of the Board of Water Commissioners and all of the transmittals were made according to the orders and direction and according to the Charter and Ordinance provisions of the City and County of Denver" (R. p. 31 & 82; F. 68 & 216).

Such were the clearly stated and only questions that were ever at any time presented for decision in this case. We, therefore, respectfully submit that thus it so affirmatively appears on the face of this record that apart from an admission of every material fact essential to a judgment for all that was asked for in the complaint, the only issues presented by McGlone and the Company with respect to their claim of non-liability upon this general official bond are that the Board of Water Commissioners acting in pursuance of Section 264 D (297B of the 1927 Edition) of the municipal Charter required said McGlone, as treasurer or custodian of the water works fund and revenues received by said board from the operation of the water works plant and system, to give a special bond conditioned in the manner determined by said board; when the unambiguous words of said section of the Charter only authorize said board to require and mandatorially require that "the treasurer SHALL give such ADDITIONAL bond conditioned in such manner as shall be determined by the board, the premium therefor to be paid out of the water works fund" (Append. Ex. C, page 61).

Searcy v. *Cullman County*, 196 Ala. 287; 71 So. 664;
State v. *Sparks*, 109 W. Va., 394; 155 S. E. 172;
City of Cudahy v. *Firer*, 215 Wis. 607; 255 N. W. 904;

Trustees etc. v. *McBride,* 221 N. Y. 231; 4 A. L. R. 1431;
Evans v. *Illinois Surety Co.,* 220 Ill. App. 216;
Holland as Governor v. *American Surety Co.,* Fla. 6 So. 2 D 280; 140 A. L. R. 1451 and note; 50 C. J. 155, Sec. 255;
Stearns Suretyship, 135;
5 Crouch on Insurance 4382, Note 23.

That the bond upon which this action is bottomed is intended to be a general bond covering the defendant McGlone as Treasurer of the City but not as TREASURER OF THE WATER BOARD (Record pages 66 & 170, folios 170 & 180); that said defendants were not liable on said bond for the reason that if any liability for the loss of said moneys existed at all that liability was on the so-called SPECIAL bond executed as required by said Board to the City by McGlone and Fidelity & Deposit Company of Maryland (Record pages ——, folios ——), but that there was no liability even on that bond because said Board prior to the transmittal of the moneys involved in this action duly authorized, ordered and directed the Department of Revenue and also directed the Manager of Revenue, ex-officio Treasurer to transmit said moneys to Kountze Brothers Banking House aforesaid AT New York to take care of the PAYMENT of all of said coupons, also the bonds aforesaid that would be there presented —and that the defendant McGlone "is informed and believes and upon such information and belief alleges that the aforesaid various accounts on the books of Kountze Brothers were opened and maintained by said Kountze Brothers at the direction of said Board of Water Commissioners" (Record pages 31 & 82, folios 68-70; 216).

It is, therefore, apparent on the face of this record that said defendants' alleged defenses and only contentions were that in the handling of the City's water works funds said McGlone was the treasurer of the Water Board and not of

the City, the party to whom both of said bonds were executed, and that there was no liability for the deposit of said moneys in Kountze Brothers Bank and their consequent loss to the City simply and only because said McGlone, being the Treasurer of said Board in handling said water works funds, was for that reason, subject to said Board's orders; so that, the only real issues in any manner presented for decision in said cause is whether McGlone was the Treasurer of the City or the Treasurer of the Board of Water Commissioners, and whether, under the City Charter, the exclusive control of the City's moneys was vested in McGlone as City Treasurer or whether, as regards said water works funds, he was Treasurer of said Board and subject to its orders as his "superior officers."

WHEREFORE we ask and answer in the following manner the questions: Did the Supreme Court of Colorado in its opinion in this case actually decide the issues that were presented to it for decision, or did it hand down an opinion upon which the decision and judgment herein were made to turn upon an issue that was never in any manner presented for decision? And in so doing, was or was not said decision in favor of the validity of a pretended order, law or statute enacted by the Board of Water Commissioners of the City and County of Denver, State of Colorado, which was drawn in question by said City on the ground of its being repugnant to the Constitution of the United States?

We are compelled by the record herein to submit that said opinion was not only based and made to turn upon an issue that was not in any manner presented for decision; that it was in favor of the validity of such an order that was so drawn in question; and that it consists only of an admixture of statements that are diametrically opposite to what the record actually shows and that cover the real issues that were presented for decision underneath a gauze-like

film of non-committal comments that make no mention whatever of the real issues, and constitute such an obvious evasion of such issues that for us, to say the least, it stands for cause for all to whose attention it might be called a lurking sense of dark foreboding fear and for all who reverence righteous judgment—crucifixion upon a cross of sorrow and of shame.

So we ask and shall endeavor to make plain our reasons for asking, the question: "Can it be said that such a significant opinion—'be forgiven for what it would do?'" in introducing to this Court the

E

Rulings of the Supreme Court of Colorado

For the purpose of making certain that the rulings of said Court shall be clearly stated, especial attention is called to the following that appears on the face of the opinion of the Supreme Court of the State of Colorado as it appears in this case:

FIRST: "The facts, AGREED UPON BY STIPULATION BETWEEN THE PARTIES, include the following." After having stated certain of the facts alleged in the answers and set forth in said so-called "Agreed Statement of Facts" that were not denied by the City, said opinion further states:

"It is further stipulated that" and proceeds to quote paragraph 24 of said so-called "Agreed Statement of Facts" as if the City had agreed to that paragraph, when the record plainly shows the contrary, and that it was specifically objected to on the ground of immateriality and irrelevancy (Record pages 98-101; 104; folios 246-247; 251-262).

SECOND: Said opinion calls attention to the separate action against McGlone and Fidelity & Deposit Company of

Maryland on the supplemental bond, which it actually says covered "the official duties of McGlone as treasurer or custodian of the water works fund" as if said funds were not the moneys of the City and in his receipt, custody and control thereof McGlone had exercised the duties of an office other than that of Manager of Revenue, ex-officio Treasurer of the City; and having called attention to the fact that "that proceeding appears to have been dismissed with prejudice" said opinion again proceeds to quote from paragraph 10 of the so-called "Agreed Statement of Facts" which was not agreed, but objected to by the City and abandoned by the defendants, and then calls attention to the supplemental answers wherein defendants pleaded the settlement and release of Fidelity & Deposit Company of Maryland and asked that this cause be dismissed, which was likewise objected to by the City and abandoned by the defendants (R. p. 101-104; 83 F. 251-262; 217; 226-227; 262).

THIRD: Departing from the issues presented for decision, said opinion proceeds to base its decision of said case squarely upon the following grounds:

> "The record shows, however, that Denver entered into a CONTRACT with Kountze Bros. whereby the latter would act as PAYING AGENT in New York City for Denver in respect to the three bond issues. The consideration for Kountze Bros. so acting was that Denver would deposit with them the sums necessary to pay the interest coupons which it was estimated would be presented for payment in New York City at least fifteen days in advance of the due date of the particular interest coupons, payment of which was being provided for by the remittance."

"The record further shows that the following letter from the Denver Board of Water Commissioners under date of

November 24, 1930, was sent to Kountze Bros. in New York City:

> 'We find that the funds to cover the interest coupons on the Denver Municipal Refunding Water Bonds Series 1927, due December 1 have not been forwarded to you as per your letter of August 3, 1927, fifteen days prior to the interest paying date.
>
> 'We are sorry this instalment was overlooked and will assure you that in the future the funds will be there in proper time.' "

(The record, page 92 F. 40 shows that this letter was signed "Board of Water Commissioners, G. F. H. Assistant Manager.")

> "Under the same date the Board wrote to the then City Treasurer, defendant McGlone's immediate predecessor in office, as follows:
>
> 'We are enclosing a copy of a letter from Kountze Brothers dated August 3, 1927 (CONTAINING THE CONTRACT ARRANGEMENTS ALREADY DESCRIBED) relative to the payment of interest on Denver Municipal Refunding Water Bonds, Series 1927 and also a copy of a letter we are this day writing to them.
>
> 'Will you kindly be governed accordingly.' "

(The record, page 93 F. 241 shows that this letter was signed "Board of Water Commissioners, G. F. Hughes, Assistant Manager.")

> "When McGlone took office, therefore, he was not merely following 'the course of conduct which had been followed prior to his induction into office' in the sense that he was following an inchoate habit which he could have changed had he desired not to take the line of least resistance. He liked his predecessor made remittance to Kountze Bros. because he found instructions from the Denver Board of Water Commissioners directing his office to make the remittances in accordance with the terms of an agreement made with the New York Banking House * * *.

> "In this case the City was under valid obligation to the bondholders to pay the bond interest either in Denver, Colorado, or at Kountze Bros. in New York City, at the option of the bondholders. It was further under obligation to Kountze Bros. to make remittance to cover the estimated presentation of interest coupons for payment in New York City at least fifteen days before the due date of the coupons * * *. Finally the Treasurer was expressly directed by his superior officers, the Denver Board of Water Commissioners to make the remittances to Kountze Bros. in such a manner as to comply with the City's contract with that Banking House."

All of this being squarely in contradiction of the facts plainly appearing on the face of the record, which shows as follows:

(1) That apart from the offer of the defendants to prove that paragraphs and parts of paragraphs of the so-called "Agreed Statement of Facts," to which the City refused to agree and objected on the ground of their "immateriality and irrelevancy," there was not one scintilla of evidence offered in the case or contained in the record to which the foregoing statements in said opinion could have reference, other than the three letters to which it refers; and these letters simply show that on August 3, 1927 Kountze Brothers addressed Exhibit E to "Hiram Hilts, Secretary Board of Water Commissioners, City of Denver, Colorado," in which they request that they be named as "fiscal agents for the PAYMENT of the interest on said bonds," and in which they said, "If funds to pay this interest are placed with us 15 days prior to the maturity of the coupons we will make no commission charge for paying these obligations."

Therefore, instead of said letter of August 3, 1927 being a contract, as stated on the face of said opinion, it constituted only an offer to act as "fiscal agent" and: the term

"fiscal agent" does not mean a depository of public funds, but refers to "fiscal duties" of "an officer within the official limits defined by law."

Baldwin v. *Dubuclet*, 27 La. Ann. 29, 33;
Folger v. *U. S.*, 13 Ct. Cl. 86, 92.

(2) Thereafter on November 24, 1930, the two letters quoted in said opinion (Record Ex. C. & D., pages 92-93) were sent to Kountze Brothers and Clem W. Collins, the predecessor of McGlone, in the name of the Board of Water Commissioners, by its Assistant Manager, as shown by Exhibits C and D (Record, pages 92-3 F. 240-241).

So that not only does the record plainly show that the pretended order of said Board to which said opinion refers and which it decides to be a contract and "valid obligation" that bound the City and McGlone to deposit said lost funds in the Kountze Brothers Bank, consists of nothing else than said letters, and that the only intimation of any evidence even of such a pretended order of said Board to McGlone to "transmit said moneys to Kountze Bros. to take care of the payment of all bond interest coupons that might be there presented" was made to his predecessor in office, and that, when testimony with respect to that allegation was offered, the City objected to it on the ground of its immateriality and irrelevancy (Record, page 104, folio 262). Nevertheless, squarely in the face of that showing said opinion actually says:

> "It is not contended that the order of the Board of Water Commissioners directing the City Treasurer to make the remittances was ultra vires, nor is it argued that the financial arrangement between the Board and Kountze Bros. was either ultra vires or illegal,"

when said Section 264 D (297 B of the 1927 Edition) of the Municipal Charter of which said Court was in duty bound to take judicial notice, expressly provides as follows:

> "The Board • • • shall daily turn over to the Treasurer of said City and County all money received.
>
> "The Treasurer of the City and County of Denver shall open and keep a separate account for said water works fund into which shall be placed all revenues received from the operation of the water works system and plant, together with all moneys coming into said fund from other sources and enter therein all receipts and disbursements on account thereof and money shall be paid out of said fund only upon warrants of the Board audited by the auditor of the City and County of Denver EXCEPT as to the bonds and the interest thereon which the Treasurer SHALL PAY without warrant or order."

And the record plainly shows that the City did object to all evidence respecting said pretended order of said Board on the ground of its "immateriality and irrelevancy" and that the Trial Court necessarily sustained those objections when it gave judgment to the City for everything it asked for in its complaint (Record, pages 104-105, 106; folios 262-264; 287).

FOURTH: Said opinion further says:

> "The Treasurer in turn was not merely authorized, but directed by ordinance of the City Council to pay both the principal of the bonds and also the interest coupons—(leaving out "at the Banking House of Kountze Bros. in New York City," etc.)—and unlike other payments—was expressly relieved of the necessity of obtaining warrants therefor." (App. Ex. A, page 55.)

when the provisions of said ordinances and said bonds positively required the PAYMENT of said bonds and in-

terest coupons to be made AT Kountze Brothers Banking House in New York City at the option of the bondholders and had nothing whatever to say concerning the deposit of said moneys at any time or place and neither said Board nor the City Council legally could have in any respect governed McGlone's exclusive control of said funds, had either of them been so disposed.

Moulten v. *McLean*, 5 Colo. App. 454;
Todd v. *Elkins*, 101 Colo. 269, 277;
In re House Resolutions, 12 Colo. 395;
Meads v. *U. S.*, 81 Fed. 684;
Smith v. *U. S.*, 170 U. S. 372, 383.

FIFTH: Said opinion says:

> "Finally the Treasurer was expressly directed by his superior officers, the Denver Board of Water Commissioners, to make the remittances to Kountze Bros. in such manner as to comply with the City's contract with that Banking House,"

when as hereinafter shown said Board is a mere administrative agency without a semblance of legislative authority to enter into such a contract for the City and its Treasurer, and whose only authority derives from said Section 264 D (297 B of the 1927 Edition) of the Municipal Charter; that thereunder it is required to act only when sitting as a Board; that the record herein shows that there was not even an attempt on the part of the defendants to show that said Board ever even knew of, much less ordered, its Assistant Manager to write said letters and that even contracts authorized by it in connection with the management and control of said water works system and plant are expressly required by said section of the Charter to be countersigned and registered by the auditor, and that "all action by the Board shall be taken by a majority of the Board, and not

otherwise," and Section 7 of said Charter expressly provides that all bonds, contracts and other instruments of writing requiring the assent of said City shall be executed by its Mayor and attested by its Clerk, with its seal attached.

Especial attention is here called to the fact that said opinion, from which the foregoing and the following quotations are made, not only bases and makes the decision and judgment in this case turn upon the existence of such a contract, entered into by said Water Board to bind the City and McGlone to deposit said moneys in the Kountze Brothers Bank in violation of the express provisions of the Charter but as hereinafter shown, said opinion does, as it necessarily had to do before such a conclusion could be reached or stated, expressly base McGlone's release upon the distinct ground that, as Treasurer or custodian of said water works funds, he was subject to an order that was enacted and whereunder he, as such Treasurer, was "expressly directed by his superior officers, the Denver Board of Water Commissioners, to make the remittances to Kountze Bros.," instead of paying said coupons AT Kountze Brothers Banking House in New York City as said ordinance and the bonds themselves provide.

SIXTH: Said opinion finally states its conclusion as follows:

> "Applying the rule of strict accountability to the defendant treasurer which we have followed in previous cases in this jurisdiction, we are of the opinion that this case comes under the exception to that rule set forth in the McBride case and recognized in the three Federal cases therein cited. Here we are of the opinion that the obligation in the bond to 'faithfully and promptly perform the duties of said office' includes the duty of making the remittances to Kountze Bros. in New York on the time schedule ordered by the Denver Board of Water Commissioners."

We respectfully submit that as regards the foregoing concluding paragraph of said opinion, it is especially noticeable that in its arrival at such an astounding conclusion said opinion, apparently overlooks all consideration of the requirement contained in the ordinances that authorize said bond issues and in said bonds themselves, that they and their coupons should, at the option of the bondholders, be payable AT Kountze Brothers Banking House in New York City; and that the conclusion so stated in said opinion was arrived at, given and made without notice to and in the absence of said bondholders who were indispensable parties to any action wherein their contract rights might be so disposed of, and without whose presence said Court was, according to its own commitments, without semblance of jurisdiction to pronounce any such judgment.

Denver Land Co. v. *Moffat Tunnel Improvement District*, 87 Colo. 1; 284 Pac. 339.

It is further especially noticeable that in its statement of said conclusion said opinion makes no mention of the fact that in *People ex rel.* v. *Koenig*, 99 Colo. 456, p. 459 (a case in which the bonds and interest coupons were made payable AT Kountze Brothers, just as were the bonds herein involved) it is expressly held that:

> "In whatever view considered, therefore, as we think, when the county treasurer deposited county funds with Kountze Brothers he acted gratuitously, and since loss attended his unauthorized action, the situation is controlled by the Patterson decision and the Colorado cases there cited."

And all of the cases there cited apply "the rule of strict accountability" which said concluding paragraph says was being applied in the decision of this case. Still, in all of said cases, the treasurers were held liable upon the same

state of facts as this record shows, while the defendants herein were held to be free from all liability.

It is still more especially noticeable that, in stating such an astounding conclusion, said opinion should, in such an obvious evasion of the issues and facts actually shown on the face of this record, so arbitrarily and capriciously ignore and cast into discard the actual facts shown on the face of the record and, in addition, the clean-cut and uncompromising distinction that carries with it such a very great difference between the actual facts shown on the face of said *McBride* case (111 Colo., 577) and the actual facts shown on the face of this record and in all the cases to which *People ex rel.* v. *Koenig, supra,* refers.

That distinction is this: That McBride was the treasurer of Trinidad, a second class city of Colorado, that is subject to the plenary powers of the State Legislature from which its charter derived. (*Denver* v. *Hallett,* 34 Colo. 393, 399; *Dalby* v. *City of Longmont,* 81 Colo. 271.) Its council was authorized by that Legislature (1935 Colo. Stat. Ann. Chap. 163) to do so and it did by ordinance actually assume control of the moneys involved in that case, by providing by ordinance as follows:

> "It shall be the duty of the city treasurer, and he is hereby, ordered to remit to the Banking House of Kountze Brothers aforesaid, by check or draft payable in New York City, New York, on the fifteenth days of June and December so long as said bonds shall remain outstanding and unpaid, a sum of money sufficient to discharge the interest accruing upon said bonds upon the first days of July and January of each year and on the fifteenth day of December in the year 1937 said treasurer shall remit a sum sufficient to discharge the principal of any of said bonds then outstanding and unpaid."

On the other hand, the City and County of Denver is a "Home Rule" city, the authority of whose people, in the

enactment of its Charter provisions for the government and control of all such local and municipal matters, is equally exclusive and exactly as plenary as that of the Legislature of the state in its enactment of statutes and making of charters for the second class cities of Colorado.

Denver v. *Telegraph Co.*, 67 Colo. 225, 235;
Denver v. *Henry*, 95 Colo. 582, 586.

Such being the record with which the Supreme Court of Colorado was confronted when said opinion was given and made, and we still being staggered by the length to which said opinion has gone in its statements respecting the issues of law and fact in said case, in deep humility and with profound regret we ask excuse for the length of all the foregoing by giving assurance that the burden to find a less detailed method of approach for the exposition of the errors embodied in said opinion has been for us a matter of agonizing difficulty. Our purpose has been, and is, to meet our responsibilities by demonstrating as nearly and clearly as possible, from the actual facts shown by this record, of what shoddy material said opinion is composed; and, as we are forced to contemplate its grim potentialities, we find ourselves alternately placing "our mouth in our hands and our hands in the dust, crying 'Unseen—unseen' " and arising to assert ourselves in muffled undertones, "O Justice, when expelled from thy local habitation, move onward and upward to find a higher dwelling place,"—the Supreme Court of the United States.

And as we start in that direction, we desire in fairness to Mr. Justice Hilliard (the author of the opinions in *People ex rel.* v. *Koenig*, 99 Colo. 456, and in *Patterson* v. *People*, 98 Colo. 86) to respectfully call attention to the fact that he "was absent at the time of oral argument and did not participate" in the decision of this case.

F

Grounds upon Which It Is Contended the Questions Involved Are Substantial

I

THE DECISION OF THE SUPREME COURT OF COLORADO IN THIS CASE IS IN FAVOR OF THE VALIDITY OF AN ORDER OF THE BOARD OF WATER COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, STATE OF COLORADO, WHICH IS DRAWN IN QUESTION ON THE GROUND OF ITS BEING REPUGNANT TO THE CONSTITUTION OF THE UNITED STATES.

The Supreme Court of Colorado has held in this case that those certain letters that are quoted in the opinion herein, constitute an order of the Board of Water Commissioners of the City and County of Denver, State of Colorado, which, when read in connection with that certain other letter that appears as Exhibit E at page 94 of the record, constitute a contract whereby said City and McGlone were bound to deposit the moneys in question in Kountze Brothers Bank, even to the extent that had said McGlone failed to so deposit said moneys he would have breached his general official bond upon which this action is bottomed.

Notwithstanding said Board of Water Commissioners is a mere administrative board, agency or department of said City and County, that is employed exclusively in the control and management of the City's water works, system and plant (In re Senate Bill 12, Colo. 188, 190-191; *County of Larimer* v. *Ft. Collins*, 68 Colo. 364; 43 C. J. 858, Sec. 1529; 2 McQuillen Municipal Corp. (2nd Ed.) Sec. 452, p. 99); and its sole authority as such derives from Section 264 D (297 B of the 1927 Edition) of the Municipal Charter; nevertheless the Supreme Court of Colorado in construing and applying

said Letters has decided that they constitute a valid, binding order that necessarily had to enter into the pretended contract whereby said City and McGlone are held by said Court to have been bound and with reference to which alone said contract had to be executed if it were to become such a binding contract as stated by said Court, in any sense of that word.

Meads v. *U. S.*, 81 Fed. 684, 687;
Bragg City Special Road Dist. v. *Missouri*, 66 A. L. R. 1056, 1059 and note;
Nicholas County Court v. *Morrison*, 115 W. Va. 18, 174 S. E. 562;
Choate v. *Trapp*, 224 U. S. 665, 671.

Such being the construction and application placed on and made of said pretended order by said opinion, necessarily it had to hold, and has held, that said order was enacted by said Board acting in a legislative capacity, because it necessarily would have to act in such a capacity for the exercise of the discretion essential to a determination of the question whether such a contract should be entered into for the purpose of so binding the City and McGlone (if it had any semblance of authority to enact such a law) as said Court has held it did.

> "To hold that power to prescribe the duties of the treasurer includes the power in the Board to select a depository, would be to hold that under authority to prescribe the duties of the treasurer the Board was vested with an authority legislative in character—an authority to determine not only that a depository should be selected and the funds deposited therewith, but also authority to prescribe the manner and conditions under which it should be selected. The contention assumes and its allowance must assume, that primarily and as a basis for making it the duty of the treasurer to deposit the funds in the designated depository, the

> Board could lawfully contract with the person or corporation to become the depository of the funds, that is make a contract whereby the depository became the debtor of the District under a contract for such time and upon such terms as the Board, in the exercise of an unbridled discretion might see fit to grant. Under that theory the Board could let the money of the District without notice, without competitive bids, without requirement of payment of interest or by the giving of security, for a time only limited by the whim of the members."
>
> *Bragg City Special Road Dist.* v. *Missouri*, 20 S. W. 2 D 22, 66 A. L. R. 153, 159.

Regardless of the fact that it has always been the law of Colorado that the absolute and unqualified control of such moneys is vested in such treasurers and that no other official or department of government can legally interfere therewith except in the case of second class cities, in which such control is authorized by the Legislature to be assumed by the councils of such second class cities (*Moulton* v. *McLean*, 5 Colo. App. 454; In re House Resolutions, 12 Colo. 395; *Todd* v. *Elkins*, 101 Colo. 269, 277; *McBride* v. *People*, 111 Colo. 577, 63 Pac. 2 D 777); and notwithstanding the City and County of Denver is a Home Rule city whose people are, under Article XX of the Constitution of the State of Colorado, vested with exactly the same absolute authority in enacting charter provisions for the control of such moneys that the Legislature of the State has in the enactment of statutes for the government of other than home rule cities, as shown hereinbefore; and by Section 4 (98 of the 1927 Edition); Sec. 51 (99 of the 1927 Edition); Sec. 53 (101 of the 1927 Edition); Sec. 54 (102 of the 1927 Edition); Sec. 58 (106 of the 1927 Edition); Sec. 221 (Sec. 108 of the 1927 Edition); Sec. 234 (111 of the 1927 Edition); Sec. 236 (113 of the 1927 Edition), and Sec. 264 D (297 B of the 1927 Edition of the Denver Charter) the

exclusive control and absolute and unqualified responsibility for the safekeeping, disbursement and accountability for all moneys of said city and county, from whatsoever source derived, are cast upon said Manager of Revenue, ex-officio Treasurer (all of which sections of said Charter that are material here are set forth in the appendix hereto under Exhibit C), still the Supreme Court of said State has decided in favor of the validity of said pretended order, law or statute of said Board of Water Commissioners, which, as so construed and applied, was and is drawn in question by the city on the ground of its being repugnant to the Constitution of the United States.

Consequently, as so construed and applied in this particular instance, said order has been held by said Court to be an order, law or statute of the City and County of Denver, State of Colorado, and for the purpose of appeal said order is a "Statute of any State" within the meaning of Section 237 (a) Judicial Code, 28 U. S. C. A. Sec. 344 (a); because:

> "The meaning of 'statute of any state' is not limited to acts of the Legislature. It is used to include every act legislative in character to which the state gives sanction, no distinction being made between the acts of the State Legislature and other exertions of the state law making power."
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> *Hamilton* v. *Regents Univ. Calif.*, 293 U. S. 245, 55 S. Ct. 197, 202;
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> *Standard Computing Scale Co.* v. *Farrell*, 249 U. S. 571, 577;
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> *Ramond* v. *Chicago Traction Co.*, 207 U. S. 20, 35, 36;
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> *John P. King Mfg. Co.* v. *City of Augusta*, 277 U. S. 100, 48 S. Ct. 489;
>
> *Miller* v. *Schoene*, 276 U. S. 272, 48 S. Ct. 246;
>
> *Demorest* v. *City Bank Farmers Trust Co.*, 321 U. S. 36, 64 S. Ct. 384.

II

SAID ORDER OF THE BOARD OF WATER COMMISSIONERS AS SO CONSTRUED AND APPLIED BY THE SUPREME COURT OF COLORADO DEPRIVES THE CITY OF ITS VESTED CONTRACT PROPERTY RIGHTS IN VIOLATION OF AMENDMENT XIV OF THE UNITED STATES CONSTITUTION.

The complaint in this case is bottomed upon the general official bond contract of McGlone as Manager of Revenue, ex-officio Treasurer of the city. Said contract was executed with reference to Section 105 of the city's charter (Ex. C), of which it is an integral part, and, concurrently with the execution thereof, the rights of the city thereunder became vested property rights.

Choate v. *Trapp*, 224 U. S. 665, 671.

> "Valid contract rights are 'property' rights whether the obligor be a private individual, municipality, state or the United States."
>
> *Lynch* v. *U. S.*, 2912 U. S. 571, 577, 55 S. Ct. 840-844.

> "a right of action which springs from a contract is property within the protection of the Fourteenth Amendment."
>
> *Forbes Pioneer Boat Line* v. *Board of Commissioners*, 258 U. S. 338, 42 S. Ct. 325;
>
> *Lamb* v. *Power River Co.*, 132 Fed. 434, 439.

> "Where a right has arisen upon a contract or transaction in the nature of a contract authorized by statute and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it or an action for its enforcement. It has become a vested right, which stands independent of the statute."
>
> *Steamship Co.* v. *Joliffe*, 69 U. S., 2 Wall., 450;
>
> *Coombes* v. *Getz*, 285 U. S. 434, 53 S. Ct. 435.

The validity of said general bond contract is in no respect questioned by either McGlone, the Company or by said opinion of the Supreme Court of Colorado, neither is the validity of the ADDITIONAL bond that was executed to the city by McGlone and the Fidelity & Deposit Company of Maryland in any respect questioned by either of said parties or by said opinion.

McGlone and the Company simply asserted that the bond was a SPECIAL bond while said opinion held that it was a supplemental bond. Upon the issue of their non-liability upon said general official bond, the only questions presented by McGlone and the Company for decision were that said bond did not cover the water works funds but that said SPECIAL bond did; that in his receipt and disbursement of said funds McGlone was the treasurer of said Water Board or the custodian of said water works funds and that he was relieved of liability upon said special bond by the orders and directions of said Water Board. Neither he nor said Company ever made so much as a suggestion that there ever existed any such thing as a contract between the city and Kountze Brothers Banking House, whereby the city and McGlone were bound by any kind of contract entered into in their behalf by said Board for the deposit of the moneys that were lost in Kountze Brothers Bank. Not until said opinion was rendered was any such thing ever hinted at by anyone, from the beginning until the final submission of said case for decision.

Notwithstanding the issue so presented for decision, said opinion based the release of McGlone and the Company from liability upon said general official bond squarely upon the proposition that both the City and McGlone were bound by such a contract so entered into with Kountze Brothers on their behalf by said board. So that, as this case stands at the present time, the city asserts the existence and terms

of its general bond contract and of property rights that became vested in it thereunder concurrently with its execution; while on the other hand said opinion of the Supreme Court of Colorado asserts the existence (without committing itself to any rational terms) of a conflicting contract which, if valid, as said opinion decides, would utterly defeat the vested rights of the city under the contract it asserts.

Both of said asserted contracts involve and consist of "statutes of any state," with reference to which they necessarily had to be made, if made at all, and which necessarily had to enter into and become parts of said asserted contracts before either of them could have any valid existence.

The decision of the Supreme Court is in favor of the validity of the pretended statute and contract that are asserted in said opinion and the validity thereof was drawn in question by the city on the ground of its repugnancy to the Constitution of the United States.

Necessarily the pretended statute and contract asserted in said opinion were enacted and entered into, if at all, subsequent to the statute and contract asserted by the city, because the official bond contract upon which this action is bottomed was based upon Section 105 of the city's Charter, which was enacted by the people of said city in 1904, and which required as a condition precedent to the qualification and induction of said McGlone into said office that he should execute such an official bond to the city, just as he did.

Likewise said additional bond was required to be executed by said McGlone to said city prior to his induction into office. Therefore, for the reason that said Board of Water Commissioners could not by any possibility enact or give any orders of any kind to said McGlone as Manager of Revenue, ex-officio Treasurer of said city, or as Treasurer of said Water Board, or custodian of said water works fund (had any such office ever had any semblance of existence)

until he had theretofore become qualified and entered upon the duties of his office; necessarily the order or statute to which said opinion refers would have to be subsequent to the execution either of said general bond or of said so-called special bond; and to have the effect attributed to it by said opinion said pretended order would have to repeal *pro tanto* not only Sections 105 and 106, but all of the other sections of the city's Charter, including the portions of said Section 264 D (297 B of the 1927 Edition) thereof that cast the whole responsibility for the receipt, control and disbursement of the city's moneys, including said water works funds and all other moneys from any source whatsoever, upon said Manager of Revenue, ex-officio Treasurer.

Consequently, if said general official bond and the additional bond that were required to be executed by said McGlone before he could qualify or be inducted into office were valid when executed to the city, in accordance with said Charter requirements, as they show on their faces they were (record, pages 92, Ex. C), with their execution property rights thereunder immediately became vested in the city, of which it could not be deprived by any possible order of said Board without violation of Amendment XIV of the United States Constitution, because such property right having so "become a vested right, which stands independent of the Statute", there would be no way or manner by which said Board could enact a subsequent order or statute that would not of necessity not only have to repeal such antecedent charter provisions or statutes, but would likewise, from necessity, deprive the city of such antecedent vested property rights.

Necessarily, before any such order enacted by said Board could have any effect whatever, that Board would have to be vested with authority at any time to assume control of such moneys and even the opinion handed down in this

case is not bold enough to assert that said Board has any such authority—evidently for the reason that it could not make mention of any of said sections of the city's Charter without divulging on its face that said Board has not the least semblance of such authority as said opinion has said it exercised, without one word in the record that gives the least support to the decision so promulgated.

WHEREFORE, whether any such contract or valid obligation as the opinion herein says exists, does exist, to defeat the vested rights that are asserted by the city, is respectfully submitted to be a question for decision by this Court on appeal, under Section 237 A, Judicial Code, 28 U. S. C., Sec. 344 (a), because of the thoroughly established construction of that section by this Court, as follows:

> "A decision of a State Court applying and enforcing a state statute of general scope against a particular transaction as to which there was a distinct and timely insistence that if so applied the statute was void under the Federal Constitution, necessarily affirms the validity of the statute as so applied and the judgment is therefore reversible by writ of error under Section 237 of the Judicial Code.
>
> "The inquiry then is whether the statute is constitutional as applied and enforced in respect of the situation presented."

Fiske v. *Kansas*, 274 U. S. 380, 47 S. Ct. 655.

> "To give the Supreme Court jurisdiction under 237 (a) no general form of words are necessary, but the claim is regarded as having been adequately presented if the record shows expressly or by fair intendment that it was brought to the attention of the State Court with fair precision and in due time. It is not necessary that the ruling of the State Court sustain a state statute against a claim of invalidity under the Federal Constitution and laws should have been put in direct

terms, but it is sufficient if the necessary effect of the judgment was to deny the claim of invalidity."

People ex rel. v. *Zimmerman,* 278 U. S. 63, 49 S. C. 61.

"Where it becomes necessary to consider whether a state is depriving or attempting to deprive a litigant of property without due process of law, in violation of the Fourteenth Amendment, and the question turns on the existence and terms of an asserted contract, this Court determines for itself whether there is a contract and what are its terms."

Railway Comm. v. *Eastern Tex. Ry. Co.,* 264 U. S. 79, 44 S. Ct. 247;

Municipal Investors' Assoc. v. *City of Birmingham,* 316 U. S. 153; 62 S. Ct. 975;

Forbes Pioneer Boat Line v. *County Commissioners,* 258 U. S. 338, 42 S. Ct. 325;

Coombes v. *Getz,* 285 U. S. 434, 53 S. Ct. 435;

Tidal Oil Co. v. *Flanagan,* 263 U. S. 444, 44 S. Ct. 197, 199;

Coppage v. *Kansas,* 236 U. S. 1, p. 15;

John P. King Mfg. Co. v. *City Council of Augusta,* 277 U. S. 100, 48 S. Ct. 489;

Demorest v. *City Bank, etc. Co.,* 321 U. S. 36; 64 S. Ct. 384.

(Assignments Fourth, Fifth, Sixth and Seventh are so closely related in principle, as respects the question of jurisdiction, that for brevity they are combined for discussion under the following heading.)

III

THE SUPREME COURT OF COLORADO BASED THE DECISION AND JUDGMENT IN THIS CASE UPON AN ISSUE THAT WAS NOT PRESENTED FOR DECISION AND UPON A STATEMENT OF FACTS THE DIAMETRICAL OPPOSITE OF WHAT THE RECORD SHOWS, AND IN SO DOING CONFISCATED AND DEPRIVED THE CITY OF ITS VESTED PROPERTY RIGHT WITHOUT DUE PROCESS OF LAW, BY REVERSING THE JUDGMENT OF THE TRIAL COURT UPON A RECORD THAT PLAINLY SHOWS A TOTAL FAILURE OF PROOF.

We respectfully submit that while it is easy to understand how it was possible for McGlone to follow the alleged "custom" of his predecessors in office of depositing such moneys in Kountze Brothers Bank without taking advice with respect to the legality of that procedure, and that it is likewise apparent how easy it was for defendants to seize upon that "custom" in the hope that it might constitute a defense to the action that they were called upon to answer; but, not only does such a "custom", including knowledge of its existence by a Board of Commissioners, fail to constitute such a defense (*People ex rel.* v. *Koenig*, 99 Colo. 456), but when the absolute control and responsibility for the safekeeping, disbursement and delivery of such moneys to his successor in office are cast upon such a custodian of public moneys by the Charter or Constitution of a City, as in this case, those provisions cannot be enlarged or restricted by any legislative action asserted by any official or department of the city, whether legislative, executive or administrative.

Smith v. *U. S.*, 170 U. S. 372, 383;

Meads v. *U. S.*, 81 Fed. 864;

Fidelity & Deposit Co. of Md. v. *U. S.*, 55 Fed. 2d 101, 103;

Phillips v. *U. S. Grain Corp.*, 279 Fed. 244, 248;

In re House Resolutions, 12 Colo. 395.

Neither is it hard to figure out just how, in view of the Common Law doctrine as respects the release of sureties, resort was had to the compromise and settlement of the action against McGlone and Fidelity & Deposit Company of Maryland for the attempted defenses that were set forth in the supplemental answers herein and how, when Sections 4, 5 and 6, Chapter 92, C. S. A. 1935 were called to attention, those defenses were dropped and endeavor made to secure from the city a trial of the case upon an "Agreed Stipulation of Facts" beneath the cover of which that hot issue might be hid from view and, as a last desperate effort, resort might be had to the argument that McGlone was excused by the orders, directions and arrangements which in his original answer he alleged, on information and belief, said Board had made for the various accounts on the books of Kountze Brothers to be "opened and maintained by Kountze Brothers at the direction of said Board of Water Commissioners" (record, pages 31, folios 68-70).

But, in the name of justice and common decency, we submit that, it is an utter impossibility to find in this record one scintilla of evidence to support, or one shred of excuse for basing, the decision of this case upon an issue that was never in any manner presented for decision, or for such statements therein as that "The facts, agreed upon by stipulation between the parties, include the following:" followed by such a misrepresentation of the actual facts that are shown on the face of the record as said opinion makes with such lack of hesitation.

And we respectfully submit that in basing and making said decision and judgment to turn upon both an issue of law that was not presented for decision, and upon a statement of facts that is the opposite of the actual facts shown on the face of the record, not only was the judgment of the Trial Court reversed upon a record that plainly shows a total failure of proof, but thereby this petitioner-appel-

lant would be, without notice or opportunity to be heard, deprived of its vested property rights in said official bond contract and also of all remedy for its enforcement, in violation of said Fourteenth Amendment—absent a Supreme Court of the United States.

Said opinion not only says that the city was bound by a contract entered into in its behalf by said Board, notwithstanding Section 29 (Section 7 of the 1927 Edition) of the City's Charter expressly provides that:

> "All bonds, contracts or other instruments of writing requiring the assent of the City and County shall be subscribed by the Mayor or Acting Mayor, as the case may be, under the seal of the City and County and attested by the Clerk",

but goes to the full extent of saying that McGlone was bound by said contract or order of said Board of Water Commissioners acting as his "superior officers", notwithstanding said Section 264 D (297 B of the 1927 Edition) of the City's Charter provides even in cases where said Board contracts when acting within the scope of its administrative duties:

> "The auditor of the City and County of Denver shall • • • countersign and register all contracts",

and that:

> "All action by the Board shall be taken by a majority of the Board and not otherwise",

and the Supreme Court of Colorado has:

> "Consistently held that contracts executed by municipal corporations in which there was a failure to comply with the mandatory provisions of the applicable statutes or Charter are void."
>
> *Swedlund* v. *Denver Bank,* 108 Colo. 400, 408.

And this record plainly shows that apart from the official bond contract that is the subject of this action, there is not

one scintilla of evidence anywhere to be found of a contract of any kind or of anything that shows even an attempt on the part of said defendants to allege or prove anything of the kind; nor do the letters upon which the whole decision of said Court is based and made to turn embrace one single intimation, much less element, of a contract or "mutual agreement between two or more competent parties for a valuable consideration touching a lawful subject matter."

So it would seem to be perfectly apparent that both of the contracts that are asserted by the city on the one hand, and in the opinion of the Supreme Court herein on the other hand, cannot possibly stand the light of day. Which one it is to be or not to be—that is the question that we herewith present for this Court's consideration and final decision under Section 237 (a) of the Judicial Code, and in so doing we respectfully submit that we are not thereby required to come seeking any mere privilege to praise a Caesar —the contract that never was—but to claim a definite right under said section to bury him—not only because he so clearly deserves it, but because, as we sincerely believe and contend, this is still, and will continue to be, America—so long as this Court still lives and the following fundamental principles remain a part of "the law of the land:"

> "The invalidity of the judgment depends upon the fact that it is in no manner responsive to the issues tendered by the pleadings. This idea underlies all litigation. Its emphatic language is that a judgment, to be conclusive upon the parties to the litigation must be responsive to the matters controverted."
>
> *Reynolds* v. *Stockton*, 140 U. S., 254.
>
> "It is hardly necessary to repeat the axioms in the equity law of procedure, that the allegations and proofs must agree, that the court can consider only what is put in issue by the pleadings, that averments without proofs and proofs without averments are alike unavail-

ing, and that the decree must conform to the scope and object of the prayer, and cannot go beyond them."

Washington Railroad v. *Bradleys*, 10 Wall, 299, 303;

Newman v. *Bullock*, 23 Colo. 217;

Russell v. *Shurtliff*, 28 Colo. 414.

"When a person is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him or giving him an opportunity to be heard is not a judicial determination of his rights, and is not entitled to respect in any other tribunal."

Windsor v. *McVeigh*, 93 U. S. 274.

"Purely arbitrary or capricious exercise of power whereby a wrongful and highly injurious invasion of property rights is practically sanctioned and the owner stripped of all remedy is at variance with fundamental principles.

"Conversely stated, the 14th Amendment requires that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the foundation of all our civil and political institutions and which are frequently designated as 'law of the land.' "

American Jurisprudence, p. 278, Sec. 581;

Truax v. *Corrigan*, 257 U. S. 312; 42 S. Ct. 673; and

"The federal guaranty of due process extends to state action through its judicial, as well as through its legislative, executive, or administrative, branch of government."

Brinkerhoff-Faris Co. v. *Hill*, 281 U. S. 673; 50 S. Ct. 451.

For these reasons, we respectfully submit that the city has been deprived of both its substantive vested right in said bond contract and of its remedial right to be heard

in defense thereof by said pretended order of its Board of Water Commissioners, as the same has been construed and applied in said opinion, and that such deprivation or confiscation of such vested rights is the combined result both of said order and said decision which, when considered either jointly or separately, bring the case within the shelter of the principles hereinbefore set forth and to which this Court has so often called attention in such cases as those cited in *Tidal Oil Company* v. *Flanagan, Coombes* v. *Getz* and *Brinkerhoff-Faris* v. *Hill, supra.*

IV

THE DECISION OF THE SUPREME COURT OF COLORADO APPLYING AND ENFORCING SAID ORDER OF SAID WATER BOARD WAS WITH DISTINCTNESS AND TIMELY INSISTENCE DRAWN IN QUESTION BY THE CITY ON THE GROUND THAT SAID ORDER, AS SO CONSTRUED AND APPLIED IS REPUGNANT TO AMENDMENT XIV OF THE UNITED STATES CONSTITUTION.

As a matter of course, it was impossible for the City to anticipate that the decision of this case would be based upon an issue that was never in any manner presented for decision or upon a statement of facts the opposite of what the record shows. The petition for rehearing shows that, at its first opportunity, the City insisted upon being heard upon the constitutional questions so necessary to be considered and decided before any final judgment could rightfully be entered in said cause. The right to be heard in its defense upon said questions was denied, with the consequence that the denial of its timely and distinct insistence upon its right to be heard upon such questions brings this case squarely within Section 237 (a) of the Judicial Code for the purpose of this appeal.

Herndon v. *State of Georgia*, 295 U. S. 441, 55 S. Ct. 794;

Municipal Investors' Assn. v. *City of Birmingham*, 316 U. S. 153; 62 S. Ct. 975.

G

Statement of Proceedings at Which, and Manner in Which, in the First Instance, and in the Appellate Court, the Federal Questions Sought to Be Reviewed Were Raised.

Said Federal questions were raised by the City at its first opportunity by petition for rehearing in the appellate court, and a summary thereof is in substance that said Court had in its opinion overlooked and misapprehended matters of law and fact essential to a proper determination of said cause and in particular the points that by its construction of the ordinances and order of said Water Board to which it refers Sections 105, 106 and the provision of Section 297B of the 1927 Edition of the City's charter, which mandatorily requires that the treasurer shall pay such bonds and interest without warrant or audit, would be repealed; that thereby said Court had drafted a contract for the city which, if drafted by its attorney would be void and in violation of its charter, and that if said opinion were not withdrawn and the judgment of the trial court affirmed the City would be deprived of its property without due process of law, in violation of Section 1 of Article XIV of the United States Constitution, for the reasons hereinbefore set forth. Said petition asked that a rehearing should be ordered and that in order to implement that order, the City should be permitted to file a supplemental brief; but said petition was denied (R. pp. 108-115).

CASES BELIEVED TO SUSTAIN JURISDICTION

The following decisions of the Supreme Court of the United States are believed to sustain the jurisdiction on

appeal of the Supreme Court of the United States for the reasons and upon the grounds that:

UNDER: SECTION 1, AMENDMENT XIV OF THE CONSTITUTION

First: Upon the ground that herein there is drawn in question, on the ground of its repugnancy to the United States Constitution, a statute of the State of Colorado in favor of the validity of which the Supreme Court of said State has decided, and for the review and construction of which this Court has jurisdiction on appeal under Section 237 (a) of the Judicial Code.

Hamilton v. *Regents Uni. of Calif.*, 293 U. S. 245; 55 S. Ct. 197, 202;

Standard Computing Scale Co. v. *Farrel*, 249 U. S. 571, 577;

Demorest v. *City Farmers Bk. Trust Co.*, 321 U. S. 36; 64 S. Ct. 384;

Miller v. *Schoene*, 276 U. S. 272; 48 S. Ct. 246;

John P. King Mfg. Co. v. *City of Augusta*, 277 U. S. 100; 48 S. Ct. 489;

C. B. & Q. R. Co. v. *Chicago*, 166 U. S. 226.

Second: Upon the ground that this Court has jurisdiction on appeal under Section 237 (a) of the Judicial Code, for the reason that the State of Colorado has deprived and is attempting to deprive appellant of its contract and vested contract property rights in violation of the due process clause of Amendment XIV of the United States Constitution.

Railway Comm. v. *East Tex. Ry. Co.*, 264 U. S. 79; 44 S. Ct. 247;

Coombes v. *Getz*, 285 U. S. 434; 53 S. Ct. 435;

Forbes Pioneer Boat Line v. *County Comm.*, 258 U. S. 338; 42 S. Ct. 325;

Coppage v. *Kansas*, 236 U. S. 1, p. 15;

Municipal Investors' Assn. v. *City of Birmingham,* 316 U. S. 153; 62 S. Ct. 975;

Tidal Oil Co. v. *Flanagan,* 263 U. S. 444; 44 S. Ct. 197, 199;

Demorest v. *City Bank, etc. Co.,* 321 U. S. 36; 64 S. Ct. 384.

Third: Upon the grounds that the State of Colorado, through its judicial department, has deprived and is attempting to deprive appellant of its property without due process of law in violation of Section, Amendment XIV of the United States Constitution, (1) by making the decision and judgment in this case to turn upon (a) an issue that was not in any manner presented for decision, and (b) upon a statement of facts that do not appear in, and that are opposite to the actual facts shown on the face of, the record herein; (2) by denying appellant an opportunity to be heard in defense of its contract and vested contract property rights upon which this action is bottomed, and (3) by reversing the judgment of the trial court herein upon a record that plainly shows a total failure of proof.

Reynolds v. *Stockton,* 140 U. S. 254;

Windsor v. *McVeigh,* 93 U. S. 274;

Truax v. *Corrigan,* 257 U. S. 312; 42 S. Ct. 673;

Brinkerhoff-Faris Co. v. *Hill,* 281 U. S. 673; 50 S. Ct. 451;

Myles Sale Co. v. *Iberia Drain Dist.,* 239 U. S. 478, 480 484;

C. B. & Q. Ry. Co. v. *Chicago,* 166 U. S. 226.

Fourth: Upon the ground that the appellant, in apt time, distinctly and with insistence drew in question the validity of a statute of the State of Colorado as the same was construed and applied by the Supreme Court of said state in this case.

Herndon v. *State of Georgia,* 295 U. S. 441; 55 S. Ct. 794 and case cited therein;

Municipal Investors' Assn. v. *City of Birmingham,* 316 U. S. 153; 62 U. S. 875;
Brinkerhoff-Faris Co. v. *Hill,* 281 U. S. 673; 50 S. Ct. 451.

Conclusion

We desire to state as our conclusion that not in the least respect do we believe or pretend to suggest that the Associate Justices who concurred in said opinion ever read over the record in this case. On the contrary, we have every confidence to believe that they simply placed their confidence in some such statements as those that are shown on the face of said opinion, and in that manner the actual issues and facts that appear in said record escaped their notice.

But we do respectfully submit that the final judgment entered in this case is not the judgment of a court, even if for the trial court the decision to which assent was so given is now the "law of the case," and the appellees may smilingly say: "It is *res adjudicata*"; because that decision was given and made in the face of a record that fails to show even a shadow of jurisdiction to decide the false issues which the opinion herein so erroneously states; while, for the time being, the City asks here for its opportunity to be heard, as interest continues to accumulate at the rate of six per cent, and it wonders why such a statement could have been made as that contained in the last paragraph of said opinion which says in substance that the "rule of strict accountability" was being applied as the case was then and there being decided and made to turn upon the exception to that rule that was applied in the *McBride* case, which so clearly shows on its face the very opposite of what the record herein shows in such unmistakable terms.

Respectfully submitted,

MALCOLM LINDSEY,
THOMAS H. GIBSON,
Counsel for Appellant.

EXHIBIT "A"

No. 15343—Oct. 1, 1945

WILLIAM F. MCGLONE AND CONTINENTAL CASUALTY COMPANY, a Corporation, *Plaintiffs in Error,*

vs.

CITY AND COUNTY OF DENVER, a Municipal Corporation, *Defendant in Error.*

Error to the District Court of the City and County of Denver, Hon. Henry A. Hicks, Judge

EN BANC.

Judgment Reversed

MR. WILLIAM F. MCGLONE, PRO SE,
BANCROFT, BLOOD AND LAWS,
Attorneys for Plaintiffs in Error.

MR. MALCOLM LINDSEY,
MR. THOMAS H. GIBSON,
Attorneys for Defendant in Error.

MR. JUSTICE JACKSON delivered the opinion of the Court.

The City and County of Denver obtained a judgment against its manager of revenue, who by virtue of that office was exofficio treasurer of the City and County of Denver, and his bondsman, the Continental Casualty Company, in the amount of $14,483.33. This judgment was based upon a bond, executed by the manager of revenue as principal and the bonding company as surety, given to secure the faithful performance of the official duties of the manager of revenue. Principal and surety bring the case here by writ of error. We shall refer to the parties as they appeared in the trial court. There is no conflict of evidence in the case. The facts, agreed upon by stipulation between the parties, include the following:

The Denver city council adopted three ordinances: one in 1914 providing for the issuance of $8,000,000 municipal water bonds; one in 1923 authorizing an additional $6,500,-

000; and one in 1928 authorizing the issuance of municipal refunding water bonds, series of 1927. All three ordinances contained the provision that the principal and interest of the bonds should be payable at the option of the holder at the banking house of Kountze Brothers in New York City or at the office of the treasurer of the City and County of Denver. Previous to the adoption of each ordinance, issuance of the pertinent bond issue had been duly authorized by the majority vote of the qualified taxpaying electors of the City and County of Denver.

It is further stipulated that, "The Board of Water Commissioners, prior to the transmittal of the moneys involved in this suit, authorized and directed the Department of Revenue, Ex-officio Treasurer, and also directed the manager of revenue, to transmit said moneys to the said Kountze Bros. Banking House at New York, to take care of the payment of all the bond interest coupons that might be there presented, and the said moneys were transmitted by the defendant McGlone and his predecessors, in obedience to the orders and directions of the Board of Water Commissioners, and all of the transmittals were made according to the orders and directions, and according to the Charter and Ordinance provisions of the City and County of Denver."

Defendant McGlone took office on June 1, 1931. Prior to that time his predecessor in office, Collins, had transmitted "to the Banking House of Kountze Bros. in the City of New York, from time to time, as needed, money from the Water Works Fund, for the purpose of meeting payments on current and next maturing interest coupons on the Municipal Water Bonds Series 1914, Series 1923 and Series 1927, which might be there presented for payment when due. The transmittals were made from separate funds respectively, and separately kept on the official books of the Treasurer, and in separate bank accounts. The separate funds had previously been set aside by the Treasurer for such several purposes out of the proceeds of the revenues received from the operation of the Water Works System and Plant, in accordance with the Charter provisions and Ordinances of the City and County of Denver, and with

the orders of the Board of Water Commissioners. The sums transmitted by Collins, Treasurer, to Kountze Bros. were properly debited by him at the time to the separate coupon accounts of the Water Works Fund, and were by Kountze Bros., properly credited at the time in separate accounts respectively, upon their books, under and according to the direction of said Collins, and of the Board of Water Commissioners."

Defendant McGlone on taking office continued the practice of his predecessors. His immediate predecessor, Collins, had already remitted funds to take care of the June 1, 1931, interest coupons that it was estimated would be presented for payment in New York. Defendant McGlone likewise, within a few days after he assumed office, remitted $20,000 to cover the July 1, 1931, interest coupons, and in July remitted $55,000 to cover the amount of August 1, 1931, interest coupons that it was estimated would be presented for payment at Kountze Bros.

On October 14, 1931, Kountze Bros. became insolvent and were declared bankrupt. At that time there were funds on deposit in the three separate coupon accounts of $25,520. As a result of the failure of Kountze Bros., defendant McGlone, on the expiration of his term of office, June 1935, was unable to turn over to his successor the funds lost in that bank. Whereupon plaintiff brought this action against the two defendants herein, based on their bond for $500,000, and also brought a separate action against defendant McGlone as principal and the Fidelity and Deposit Company of Maryland as surety on a supplemental bond taken out in accordance with a city charter provision for $100,000 covering the official duties of defendant McGlone as treasurer or custodian of the water works fund. The latter proceeding appears to have been dismissed with prejudice by the plaintiff in consideration of the payment to it by the Fidelity and Deposit Company of Maryland of $18,171.26, "and the defendant herein is now made defendant in an action brought by Fidelity & Deposit Company of Maryland against the defendant, Continental Casualty Company, wherein the Fidelity & Deposit Company of Maryland seeks recovery of the same items as are involved in this cause, and predicates its action upon the

claim that it is a subrogee of the plaintiff herein or a sub-surety or co-surety for the defendant McGlone, and the defendant, Continental Casualty Company is presently defendant in two suits by different parties for the same claim or demand."

The amount of the judgment, $14,483.33, was determined by taking the amount on deposit with Kountze Bros. at the time of their failure, $25,977.50, crediting that amount with the $18,171.26 received in settlement with the Fidelity & Deposit Company of Maryland plus the amount received as liquidating dividends from the receiver of the insolvent bank, $3,411.40, and then adding interest at six per cent per annum on the remaining unpaid balances, $10,088.49.

It appears from the record that $477.50 out of the total sum of $25,997.50, which was in the hands of Kountze Bros. at the time of their failure, was money in the interest account of certain building site bonds of the City and County of Denver. The specifications of error relate only to the interest accounts of the three series of water bonds of the City and County of Denver heretofore mentioned, which together made up the total sum on deposit with Kountze Bros. when added to the $477.50 item. The specifications make no mention of this $477.50 building site bond account, nor is it referred to in the stipulation. The record shows no historical background concerning these building site bonds, such as exists relating to the three series of water bonds. There is nothing by which to judge whether the duties of the treasurer relating to the servicing of the interest on the building site bonds were similar to his duties in respect to paying the interest coupons on the water bonds. We are left in no position to pass upon that particular phase of the case, and our opinion and judgment apply solely to the funds in the three coupon accounts with Kountze Bros. relating to the water bonds.

It should also be added that by separate supplemental answers both defendant principal and defendant surety company pleaded the settlement and release executed by the Fidelity & Deposit Company running to the City and County of Denver, and by reason thereof asked that this

cause be dismissed. This phase of the case is not included in the specification of points, and no reference to it appears in the briefs or the oral argument. In accordance with our regular practice, therefore, the points urged in the supplemental answers will be deemed to have been abandoned. *Contes* v. *Metros*, 111 Colo. 561, 144 P. (2d) 782; *Edwards* v. *Quackenbush*, 112 Colo. 337, 149 P. (2d) 809.

The findings of the trial court include this statement: "The defendant McGlone was not guilty of any moral misconduct in connection with the remittance of moneys to New York. The moneys sent by him and his predecessor were sent with the approval and under the orders of the Board of Water Commissioners of the City and County of Denver, and the transaction was shown on the books of the treasurers. McGlone simply followed the course of conduct which had been followed prior to his induction into office. The question involved in this litigation, however, is whether or not under the undisputed facts there is legal liability on the part of the defendants. The court is of the opinion that such legal liability exists, and so finds." This finding was based specifically on two cases, *Patterson, et al.* v. *People*, 98 Colo. 86, 53 P. (2d) 1187, and *People ex rel.* v. *Koenig, et al.*, 99 Colo. 456, 63 P. (2d) 1235, by reason of which the court felt compelled to hold the defendants liable.

The findings and judgment of the trial court were made and entered prior to our decision in *McBride v. People*, 111 Colo. 577, 144 P. (2d) 777. Reference is made to that case and to the Koenig and Patterson cases, supra, in 155 A. L. R. 436 in a recent note on the subject of liability of a public officer on his bond for loss of public funds due to insolvency of bank in which they were deposited. Likewise, all of the original briefs of both parties on appeal were written and filed here while the McBride case was still pending. Immediately after the opinion in that case had been announced, defendants filed a supplemental brief in support of the point that the disposition of the instant case was controlled by the McBride case. In that case we held that where an ordinance of a Colorado city of the second

class expressly makes it the duty of, and orders the city treasurer to remit certain moneys to a bank named in the ordinance for the purpose of paying interest on bonds issued by the city, and moneys so remitted by that official in compliance with the ordinance are lost due to the failure of the bank, neither the treasurer nor the surety on his official bond is liable to the city for such loss.

In the instant case, the respective ordinances passed by the Denver City Council authorizing the issuance of the three bond issues herein involved all provided that the principal and interest of the bonds should be payable at the option of the holder either at Kountze Bros., New York City, or at the office of the City Treasurer in Denver. The ordinances differ from the Trinidad ordinance in the McBride case, in that they contained no express mandate to the city treasurer directing him to remit funds to the bank named in the ordinances and in the bonds and interest coupons issued in pursuance thereof. The record shows, however, that Denver entered into a contract with Kountze Bros. whereby the latter would act as paying agent in New York City for Denver in respect to the three bond issues. The consideration for Kountze Bros. so acting was that Denver would deposit with them the sums necessary to pay the interest coupons, which it was estimated would be presented for payment in New York City at least fifteen days in advance of the due date of the particular interest coupons, payment of which was being provided by the remittance. The record further shows that the following letter from the Denver Board of Water Commissioners, under date of November 24, 1930, was sent to Kountze Bros. in New York City:

> "We find that the funds to cover the interest coupons on the Denver Municipal Refunding Water Bonds, Series 1927, due December 1st, have not been forwarded to you, as per your letter of August 3rd, 1927, 15 days prior to the interest paying date.
>
> "We are sorry this instalment was overlooked and will assure you that in the future the funds will be there in proper time."

Under the same date the Board wrote to the then city treasurer, defendant McGlone's immediate predecessor in office, as follows:

> "We are enclosing a copy of a letter from Kountze Brothers dated August 3rd, 1937, (containing the contract arrangements already described) relative to the payment of interest on Denver Municipal Refunding Water Bonds, Series 1927, and also a copy of a letter we are this day writing to them.
>
> "Will you please be governed accordingly."

When defendant McGlone took office, therefore, he was not merely following "the course of conduct which had been followed prior to his induction into office," in the sense that he was following an inchoate habit which he could have changed had he desired not to take the line of least resistance. He, like his predecessor, made the remittances to Kountze Bros. because he found express instructions from the Denver Board of Water Commissioners directing his office to make the remittances in accordance with the terms of an agreement made with the New York banking house. It is not contended that the order of the Board of Water Commissioners directing the City Treasurer to make the remittances was ultra vires. Nor is it argued that the financial arrangement between the Board and Kountze Bros. was either ultra vires or illegal. The creation of the Board of Water Commissioners, as a valid body under the Denver charter, is not questioned. No attack is made on the legality of the elections authorizing the issuance of bonds, nor on the ordinances of the city council authorizing the issuance of the respective bond issues.

The facts in this case, therefore, would seem to make the McBride case, and not the Patterson and Koenig cases, controlling. In the two latter cases we held that the respective county treasurers there involved had acted gratuitously and without any definite legal sanction to support their remittances to the same New York Bank, the insolvency of which has given rise to this litigation.

In this case the city was under valid obligation to the bondholders to pay the bond interest either in Denver,

Colorado, or at Kountze Bros. in New York City, at the option of the bondholder. It was further under valid obligation to Kountze Bros. to make remittances to cover the estimated presentation of interest coupons for payment in New York City at least fifteen days before the due date of the coupons.

The treasurer in turn was not merely authorized, but directed by an ordinance of the City Council, to pay both the principal of the bonds and also the interest coupons, and unlike his other payments—was expressly relieved of the necessity of obtaining warrants therefor.

Finally, the treasurer was expressly directed by his superior officers, the Denver Board of Water Commissioners, to make the remittances to Kountze Bros. in such a manner as to comply with the city's contract with that banking house.

The existing circumstances left no field of choice for defendant treasurer—his not to make reply, his not to reason why, his but to obey. The chain of circumstances in this case differs only from that in the McBride case in that here there are a few more links, but the chains are alike in that they tie both treasurers to one specified course of conduct. They leave them no option in the matter. A failure to comply with the directions given them in respect to making provision for the payment of the interest coupons, would, in our judgment, make them liable for a breach of their bonds, even as they have been charged with a breach for failure to turn over the lost funds to their successors in office.

Applying the rule of strict accountability to defendant treasurer which we have followed in previous cases in this jurisdiction, we are of the opinion that this case comes under the exception to that rule set forth in the McBride case and recognized in the three federal cases therein cited. Here, we are of the opinion that the obligation in the bond to "faithfully and promptly perform the duties of said office," included the duty of making the remittances to Kountze Bros. in New York on the time schedule ordered by the Denver Board of Water Commissioners.

The judgment accordingly is reversed.

Mr. Justice Hilliard was absent at the time of oral argument, and does not participate.

On Petition for Rehearing

The Court is of the opinion that any new matters presented in the petition for rehearing are answered either by the opinion or by the stipulation between the parties set forth therein.

Petition for rehearing denied.

Hilliard, J., was absent at the time of oral argument, and does not participate.

EXHIBIT "B"

Filed in District Court, City & County of Denver, Colo. Jan. 5, 1943. John T. Doyle, Clerk.

STATE OF COLORADO,
City and County of Denver, ss:

IN THE DISTRICT COURT

No. A 15043

Division 3

CITY AND COUNTY OF DENVER, a Municipal Corporation, *Plaintiff*,

vs.

WILLIAM F. McGLONE AND CONTINENTAL CASUALTY COMPANY, a Corporation, *Defendants*

Opinion, Findings, and Conclusions of the Court

This action was instituted by the City and County of Denver to recover judgment against William F. McGlone, who was from June 1, 1931 to June 1, 1935 Manager of Revenue, Ex-officio Treasurer of the City and County of Denver, and against Continental Casualty Company, a

corporation, surety on an official bond of said McGlone, for the sum of $25,227.50, which amount the complaint alleges was received by McGlone in said official capacity, and which amount it is alleged he should have, but failed, to turn over to his successor in office. The complaint also demands interest on said sum.

Both defendants answered, denying liability. The case has heretofore been tried to the court without a jury, and taken under advisement, and is now to be decided.

There is no dispute concerning the facts involved in the litigation, although plaintiff objected to the pertinency, relevency and materiality of certain facts introduced in evidence by the defendants. The cause having been tried without a jury, the court has thought best to admit and does admit all of the evidence objected to. This in view of the fact that if a review of the judgment now to be rendered is had in the Supreme Court of Colorado that court will have before it all the facts which have given rise to the litigation.

In the following opinion, findings and conclusions the defendant William F. McGlone is referred to as defendant McGlone, and the defendant Continental Casualty Company is referred to as the Continental Company.

On June 1, 1931 defendant McGlone duly and regularly succeeded one Clem W. Collins as Manager of Revenue, Ex-Officio Treasurer of the City and County of Denver, and defendant McGlone continued in said office until June 1, 1935.

At the time of defendant McGlone's induction into said office he executed an official bond in the sum of $500,000.00, with the Continental company as surety thereon. The pertinent provisions of the bond are in substance that the bond shall be null and void and provided defendant McGlone as such officer should promptly perform the duties of said office, and pay according to law all moneys which come to his hands as such Manager of Revenue and turn over to his successor "all moneys deposited with him for any cause whatsoever and all City and County property which may come to his hands," otherwise the obligations of the bond to remain in full force and effect.

On the same day, June 1, 1931, defendant McGlone, as such official, executed another bond to the City and County of Denver in the sum of $100,000.00. On this bond The Fidelity and Deposit Company of Maryland, not a party to this suit, and hereinafter referred to as the Fidelity Company, is surety. This $100,000.00 bond was given pursuant to Section 264-D of the charter of the City and County of Denver, which provides that the treasurer of said City and County shall operate and keep a separate account of the Water Works Fund of the City and County, in which fund shall be placed the revenue received from the water works system and plant, together with all moneys coming into said fund from other sources, and to enter therein all receipts and disbursements on account thereof, and pay out the funds thereof, and perform other duties as treasurer of said Water Works Fund, and which section also provides that the treasurer shall give such additional bond conditioned in such manner as shall be determined by the Board of Water Commissioners. This $100,000.00 bond contains the same provisions in general as are in the $500,000.00 bond, except that the bond refers only to moneys, revenues and property belonging to the Water Works Fund.

Both of the bonds were duly approved and accepted by the proper public officials, and after such approval and acceptance defendant McGlone entered upon the duties of said office.

Prior to McGlone's induction into office his predecessors in office had as such treasurer transmitted moneys from the Water Works Fund of the City and County to the banking house of Kountze Bros. in the City of New York. The reason such moneys were sent to New York was that the City and County had issued and sold negotiable municipal bonds, with coupons attached, payable semiannually, at the office of the treasurer of the City and County of Denver, or at the option of the holders of said securities, at said banking house in New York City. At the time McGlone became treasurer of the City and County of Denver there was on deposit with said banking house in New York City $219,832.50 of the moneys so sent to New York by the defendant McGlone's predecessor in office. McGlone, on becoming treasurer, receipted to his predecessor in office for this amount of money the same as if the money had been

turned over to McGlone in Denver. Thereafter, McGlone, as such treasurer, sent to said banking house for the purpose aforesaid, $80,000.00 from the Water Works Fund of the City and County of Denver. Thereafter, in October, 1931, said banking house failed, and eventually the bankruptcy court in New York City administered the assets of the bankrupt. At the time of the failure there was on deposit with Kountze Bros. the sum of $25,977.50, the amount of money so sent to New York which had not been paid out by Kountze Bros. to holders of the said negotiable bonds issued by the City and County of Denver.

After McGlone ceased being treasurer, the City and County of Denver brought this suit against McGlone and the Continental Company on said $500,000.00 official bond to recover said sum of $25,977.50. It also brought suit against McGlone and the Fidelity Company on said $100,000.00 bond to recover said amount of $25,977.50. Both suits were of course brought on the theory that the failure of Kountze Bros. did not release the defendant McGlone from accounting for and paying over to his successor in office the said amount of $25,977.50. After the said failure of Kountze Bros. the City and County of Denver filed in the New York bankruptcy court its claim for said amount, and it thereafter, on towit, January 15, 1939, received on its claim a liquidating dividend of $1,299.88, and on January 15, 1940 a further liquidating dividend of $2,111.52. The said suit brought on the $100,000.00 bond on which the Fidelity Company was surety was dismissed with prejudice by the plaintiff in consideration of the payment to the City and County by the Fidelity of the sum of $18,171.26, which amount was paid to the City and County on April 21, 1941.

The defendant McGlone was not guilty of any moral misconduct in connection with the remittance of moneys to New York. The moneys sent by him and his predecessor were sent with the approval and under the orders of the Board of Water Commissioners of the City and County of Denver, and the transaction was shown on the books of the treasurers. McGlone simply followed the course of conduct which had been followed prior to his induction into office. The question involved in this litigation, however, is whether or not under the undisputed facts there is legal liability on

the part of the defendants. The court is of the opinion that such legal liability exists, and so finds. Under the terms and conditions of the bond given by McGlone sued on in this case, and under the law as the court understands the law to be, it was the legal duty of the defendant McGlone, when he went out of office, to deliver to his successor in office the $25,977.50 hereinbefore mentioned, and this he did not do, nor has he since paid any part of that sum to the City and County. The failure of Kountze Bros. furnishes no legal excuse for such failure. In two cases heretofore decided by the Supreme Court of Colorado, public officers and the sureties on their official bonds have been held liable for moneys lost through the same failure of Kountze Bros.

Patterson et al. vs. People ex rel. Board of County Commissioners of the County of Weld (1935), 98 Colo. 86, 53 Pac. (2d) 1187;

People ex rel. Board of County Commissioners of the County of Jefferson, vs. Koenig et al., (1936), 99 Colo. 456, 63 Pac. (2d) 1235.

Defendants' counsel have ably contended that the rulings made by the Supreme Court in the cited cases do not govern this case, but in view of said cited cases and others along the same line, this court is compelled, in its judgment, to hold the defendants liable.

The court finds further, that the defendants are entitled to credit or deduction on account of the amounts received by the City and County as liquidating dividends, and the said amount received by the City and County from said Fidelity company.

The plaintiff is entitled, under the law, to interest. Counsel for the City and County have filed with the court a computation of the interest at six per cent, crediting the defendants with the payments hereinbefore mentioned, which computation shows the present liability on the part of the defendants to the City and County of Denver as principal and interest due from the defendants in the amount of $14,483.33, which computation and amount the court approves.

Judgment therefore is ordered to be entered in favor of the plaintiff and against the defendants for said amount of $14,483.33 and costs of the cause.

Motion for new trial is dispensed with.

Defendants are each allowed an exception to the rulings of the court and the judgment so to be entered.

The issuance of execution on the judgment is stayed for five days and for an additional twenty-five days, and time and until sixty days from this date is allowed the defendants to prepare and tender a reporter's transcript.

Done and signed in open court this fifth day of January, 1943.

By the Court: HENRY A. HICKS,
Judge.

EXHIBIT "C"

THE CHARTER PROVISIONS THAT CONFER THEIR AUTHORITY AND IMPOSE THEIR DUTIES UPON THE MANAGER OF REVENUE, EX-OFFICIO TREASURER AND BOARD OF WATER COMMISSIONERS, RESPECTIVELY.

Section 98, 1927 Edition:

(Section 4) There shall be, and hereby is, created a department of revenue, which shall have full charge and control of, exercise all powers, perform all acts and duties now required, or that may hereafter be required by the Constitution, or general laws of this state, to be exercised or performed by the county assessor and county treasurer, which shall include all powers and duties of the assessor and treasurer, heretofore performed by the commissioner of finance.

The manager of the department of revenue shall be the officer in full charge and control of said department, and shall devote his entire time to the duties of his office. (Charter Amendment, May 17, 1916.)

Section 99, 1927 Edition:

(Section 51) The treasurer shall receive, receipt for and keep the money of the city and county and pay out the same on warrants as herein provided. (Charter, March 29, 1904.)

Section 101, 1927 Edition:

(Section 53) He shall keep an account with each fund, special and general, and when a warrant is drawn on any particular fund it shall be paid out of that fund only. (Charter, March 29, 1904.)

Section 102, 1927 Edition:

(Section 54) No money shall be paid out by the treasurer for any purpose except upon warrants drawn upon him by the auditor unless otherwise provided by this charter • • • *Provided*, the treasurer may pay the interest and principal on bonded indebtedness including special improvement bonds as the same become due without a warrant having previously issued therefor. (Charter, March 29, 1904.)

Section 105, 1927 Edition:

(Section 57) The treasurer shall give a bond to the city and county with sufficient sureties, which sureties shall be responsible surety companies, to be approved by the mayor and council, in the sum of five hundred thousand dollars, and for such additional sum as the mayor and council shall require, conditioned as by the general statutes relating to bonds of county treasurers and as may be further required by ordinance, and for paying over to his successor in office all sums of money belonging to the city and county as shall be in his hands, and to account for and turn over to his successor all moneys deposited with him for any cause whatsoever, and all city and county property which may come into his hands.

The cost of said bond shall be borne by the city and county, to be audited, allowed and paid out of the treasury as provided for the payment of other general expenses. (Charter, March 29, 1904.)

Section 106, 1927 Edition:

(Section 58) The treasurer shall, with the approval of the mayor and auditor, select annually, or oftener if necessary, one or more banks or banking institutions in the city and county which shall pay the highest interest for the average current deposit of the city and county funds.

a bond to the city and county with such conditions and in such sum as may be determined by the mayor, auditor and attorney, but not less than the maximum amount which shall be on deposit at any time. The sureties shall be approved by the mayor, auditor and attorney, and shall be other than the surety on the treasurer's bond. • • • The surety on such bond shall be a responsible surety company. (Charter, March 29, 1904.)

Section 108, 1927 Edition:

(Section 221) All monies arising • • • from any other source whatsoever, which may be collected or received by any officer of the city and county, or any department thereof, in his official capacity, for the performance of any duty shall be paid into the treasury. No officer or person other than the treasurer shall pay out or disburse such moneys or any part thereof, except as herein otherwise provided. (Charter, March 29, 1904.)

Section 111, 1927 Edition:

(Section 234) The income and revenue paid into the treasury shall at once be apportioned to and kept in appropriate funds, and such money, including the several funds now in the treasury, shall not be used for any purpose other than that for which the same were raised, provided that surplus and unused money in any fund may during the fiscal year be transferred from one fund to another by ordinance only, except as otherwise provided in this charter. (Charter, March 29, 1904.)

Section 113, 1927 Edition:

(Section 236) The bonded indebtedness interest fund shall be kept and used only in the payment of interest annually accruing on bonded indebtedness.

The sinking fund shall be kept and used only in the purchase, payment and redemption of the bonded indebtedness of the city and county. (Charter, March 29, 1904.)

Section 297 B, 1927 Edition:

(Section 264 D) There shall be and hereby is created a non-political Board of Water Commissioners of five mem-

bers, to have complete charge and control of a water works system and plant for supplying the city and county of Denver and its inhabitants with water for all uses and purposes * * *.

The Board shall have and exercise all the powers of the city and county granted by the constitution and laws of the State of Colorado and by the Charter, in the matter of purchasing, condemning and purchasing, acquiring, constructing, leasing, extending and adding to, maintaining, conducting and operating a water works system and plant for all uses and purposes, and everything necessary, pertaining, or incidental thereto. * * * It shall have power in the name of the City and County of Denver to make and execute contracts necessary or incidental to the powers herein granted: and shall also in the name of the City and County of Denver institute and defend all litigation affecting its powers and duties or in relation to said water works system and plant and the property and rights connected therewith or incidental thereto. * * *

The Board shall make an itemized monthly statement of all moneys received and paid out by it and all indebtedness incurred, a copy of which it shall file with the Auditor of the City and County of Denver, and shall daily turn over to the treasurer of said City and County all money received.

The Treasurer of the City and County of Denver shall open and keep a separate account for said Water Works Fund into which shall be placed all revenues received from the operation of the Water Works system and plant together with all monies coming into said fund from other sources, and enter therein all receipts and disbursements on account thereof, and moneys shall be paid out of said fund only upon the warrants of the Board, audited by the Auditor of the City and County of Denver, except as to the bonds and interest thereon which the Treasurer shall pay without warrant or audit. * * *

The Treasurer shall give such additional bond conditioned in such manner as shall be determined by the Board, the premium therefor to be paid out of the Water Works Fund. * * *

The Auditor of the City and County of Denver shall • • • countersign and register all contracts.

A majority of the Board shall constitute a quorum, and all action by the Board shall be taken by a majority of the Board and not otherwise. (Amendment adopted, Aug. 6, 1918.)

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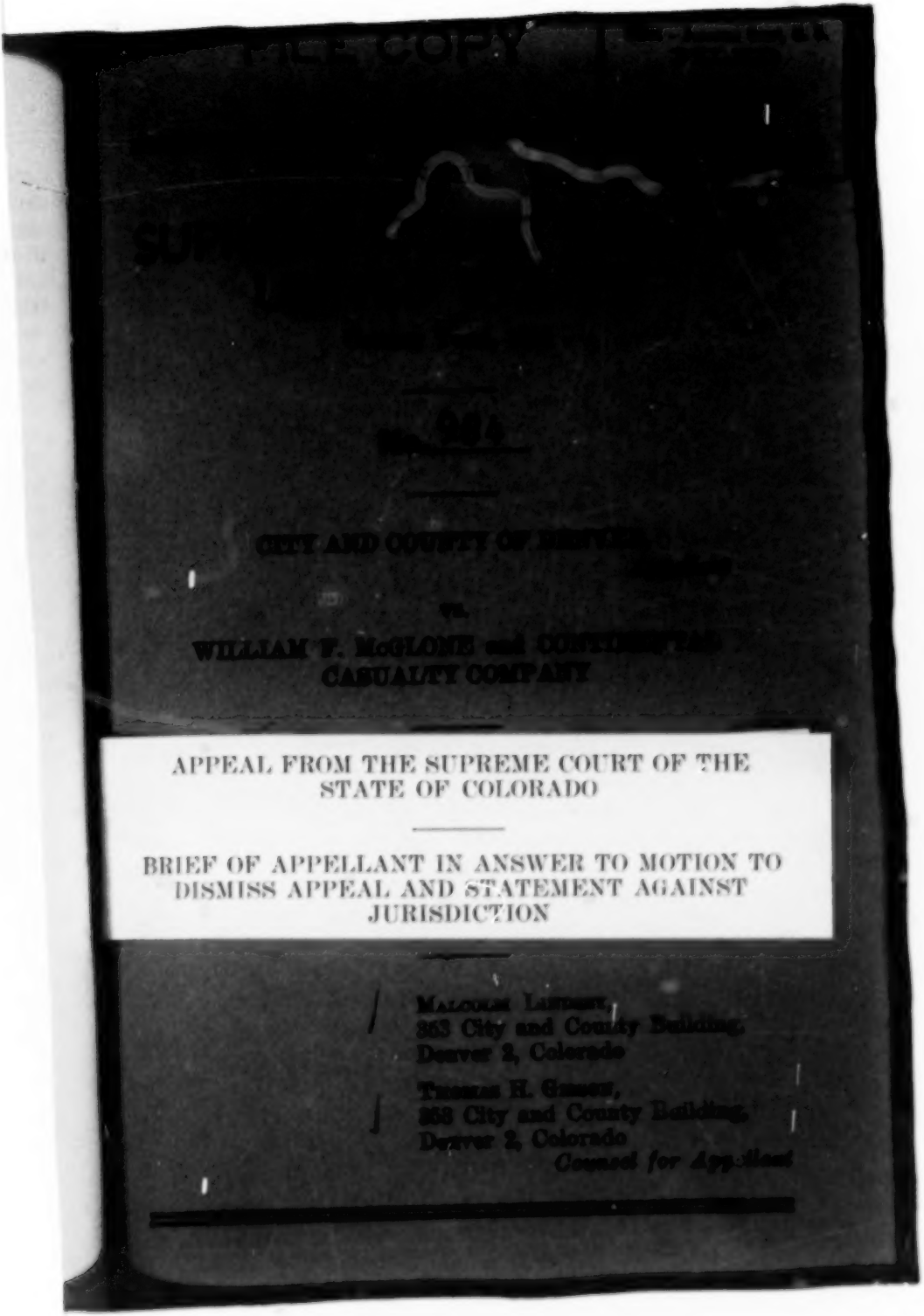

No. 944

CITY AND COUNTY OF DENVER,

vs.

WILLIAM T. McCLONE and CONTINENTAL CASUALTY COMPANY

APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

BRIEF OF APPELLANT IN ANSWER TO MOTION TO DISMISS APPEAL AND STATEMENT AGAINST JURISDICTION

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Counsel for Appellant

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No. 15343

IN THE

Supreme Court

OF THE

State of Colorado

WILLIAM F. McGLONE and CONTINENTIAL CASUALTY COMPANY, a Corporation,
Plaintiffs in Error

vs.

CITY AND COUNTY OF DENVER, a Municipal Corporation,
Defendant in Error

Error to the County Court of the County of Arapahoe

Honorable Henry Bruce Teller Judge

BRIEF OF DEFENDANT IN ERROR-APPELLANT IN ANSWER TO MOTION TO DISMISS APPEAL AND STATEMENT AGAINST JURISDICTION

PRELIMINARY STATEMENT

We find ourselves confronted with the Motion to Dismiss that is accompanied by a "Statement of the Case" and "Argument," which we respectfully submit consists of a conglomorate of gratuitous assumptions and misleading assertions respecting the issues of law and fact shown by the record herein, and which, when placed beside admissions that are contained therein, show either an intentional or unintentional presentation of the so-called "command or direction" or authority which was pleaded by McGlone and the Company "on information and belief" to have been an *arrangement* by the Board of Water Commissioners with Kountze Brothers Banking House for it to act as "Fiscal Agent" for the *pay-*

ment of bond interest coupons that they pleaded as their defense, instead of devoting their attention to a frank consideration of the propositions which we have presented for consideration on the questions of jurisdiction, to wit: that the decision of this case was based and made to turn upon a so-called ORDER of said Board, which the Supreme Court of Colorado held to be a CONTRACT that was never in any manner pleaded or placed in issue; which to exist at all would of necessity have to be an act legislative in character; which was first announced and decided to be such an order or contract by said Court, and the validity of which was thereupon, in apt time, drawn in question by the City on the ground of its being repugnant to the Constitution of the United States, by petition for rehearing, which was denied.

For these reasons it becomes necessary that we should first call especial attention to, and answer in detail, the contents of the "Statement of the Case" before proceeding to answer the propositions stated in the Motion to Dismiss, as they are presented for argument.

SUMMARY OF ARGUMENT

This is a civil action that was instituted by the City and County of Denver in the District Court of the City and County of Denver, State of Colorado, upon a bond in the penal sum of $500,000.00 that was executed to it by the Plaintiffs in Error (Appellees), who were the defendants in said trial court.

Said bond was the general official bond of said McGlone, as Manager of Revenue, Ex-officio Treasurer of said City and County, and the complaint in said cause alleged the breach thereof in that McGlone had converted and failed to account for or turn over to his successor $25,997.50 of the City's moneys that were in his hands as such Treasurer.

Said bond was executed in litteral compliance with Section 105 of the City's Charter which provides that such bonds shall be conditioned as follows:

> " * * * for paying over to his succesor in office all such sums of money belonging to the City and County

as shall be in his hands, and to account for and turn over to his successor all moneys deposited with him for any cause whatsoever."

In their answers the defendants in said trial court admitted that said McGlone had deposited moneys of the City in Kountze Brothers Banking House in New York City in the aggregate of the amount asked for by the City in its complaint, and that he was unable to return them because of the failure of said bank, but denied liability, and alleged as their defenses:

1. "That liability, if any, was upon McGlone's *special* bond given as Treasurer of the Board of Water Commissioners, and not upon the bond sued upon in this case, given by him as County Treasurer"; and
2. "That he sent the Board's funds, lost in this case, to Kountze Brothers upon the direction and command of the Board, his superiors, who had the exclusive control and jurisdiction over such funds."

Said Board is a mere administrative agency of said City and County that owns no funds and all monies of the City that are collected by it for water service are required to be daily turned over to the Treasurer of said City and County, upon whom the charter of the City casts the burden of exclusive responsibility for the receipt, control, safe keeping and disbursement of all the City's moneys, and, in particular all moneys that are received by him from the Water Board to be placed in a bonded indebtedness interest fund and a sinking fund which are required to be kept and used only in the payment of interest and in the purchase, payment and redemption of the bonded indebtedness of the City and County.

Said Treasurer is mandatorily required by the Charter to pay such interest and bonds without even warrants of the Board or audit by the Auditor.

There is no such thing as a special bond required of, nor was any such bond ever executed by, the Treasurer to said Board or anyone else. The charter authorizes the Board to require and mandatorily requires the Treasurer to execute an ADDITIONAL bond to the City and County; and the first of the defenses above mentioned was not only abandoned by

the Plaintiffs in Error (appellees), but in its opinion herein the Supreme Court of Colorado designated the bond referred to in said first defense as a supplemental bond.

The only evidence that was offered to support the alleged "direction and command" contained in said second defense consisted of the letters to which said opinion refers, two of which are set forth by copy therein, and to the other of which said opinion refers as "containing the contract arrangements already described", and that is to say, the contract that said opinion construed said letters to be, and to have been entered into by said Water Board in behalf of both the City and McGlone, binding them to deposit the city's moneys in said Kountze Brothers Bank, contrary to the many provisions of the City's Charter. (See Appendix to "Statement as to Jurisdicion" Exhibit C).

Said letters do not even purport to be a "direction or command" given or made by said Water Board to anyone, and were all written long before McGlone was inducted into office as Treasurer, were not addressed to him, and no evidence was offered to prove that said Board authorized them in the manner required by the charter for the enactment of any orders it may lawfully enact.

Notwithstanding said Board is a mere administrative agency that derives its sole authority from Section 297B of the City Charter, 1927 Edition (Exhibit C, Appendix to Statement as to Jurisdiction) and that section provides that "all action by the Board shall be taken by a majority of the Board and not otherwise", and that the Auditor "shall countersign and register all contracts", in its decision of this case, the Supreme Court of Colorado ruled and decided that said letters were an ORDER of said Board that constituted a CONTRACT entered into by it with Kountze Brothers Banking House whereby both the City and McGlone were bound to deposit said moneys in that Bank in New York City contrary to the provisions of Section 106 of the City's Charter which requires that the City's moneys shall be deposited in Denver banks that pay the highest interest and will give depository bonds for the security of the City and County, executed by sureties other than the surety on the Treasurer's bond.

Ever since the question was first raised in the Colorado Supreme Court the "rule of strict accountability" has been

applied by that Court, following that rule as it is stated in U. S. vs. Prescott, 3 How. 578, and the opinion in the instant case says that "applying the rule of strict accountability" • • • the Court is of the opinion" that said pretended ORDER or contract constituted an exception thereto.

Said opinion is based and made to turn upon the proposition that said McGlone was absolved from liability by reason of said pretended order or contract alone. That was an issue that was in no manner presented for decision, and the statement of facts shown on the face of said opinion is the opposite of the facts actually shown on the face of the record.

By so construing and applying said letters as being such an order or contract the bond contract sued upon was abrogated and said appellees were discharged of all liability on account of McGlone's breach thereof as alleged in the complaint.

Wherefore, because the sole issue that was presented for decision was whether the appellees were liable for the breach of said bond contract the failure to perform the condition of which they admitted, necessarily the case could not be decided without a consideration and construction of both said bond contract and the so-called "command or direction" that was the only defense upon which appellees relied for exhoneration; and said ruling necessarily abrogated said McGlone's official bond contract and, in so doing, constituted a decision in favor of the validity of the pretended ORDER or CONTRACT which said letters were so construed and held to be, and which necessarily had to be an act legislative in character to be such an order or contract entered into by said Board for the City and McGlone at all, had there been the semblance of authority on its part to enter into such a contract.

The consequence is that a Federal Constituitonal question appears on the face of said opinion itself and was not required to be specially set up in that Court to entitle the City to an appeal as a matter of right under Section 237(a) of the Judicial Code. But, regardless of that fact, the City filed a Petition for Rehearing in which it called said Court's attention to the error committed in its construction and application of said pretended ORDER, and to the points that it had based and made said decision to turn upon an issue that had not

been presented for decision and upon a statement of facts the opposite of what the record actually shows, and that, if said opinion were not withdrawn and the judgment of the trial court affirmed, the City would be deprived of its property without due process of law in violation of Article XIV of the United States Constitution. In this manner, not only was the validity of said pretended ORDER drawn in question as being repugnant to the United States Constitution for all of said reasons; but because the record has been properly brought to this Court on appeal under Section 237 (a) of the Judicial Code for the reason that the case involves the constitutionality of said ORDER, the inclusion of the other Federal constitutional questions in the assignments of error is proper, and they are rightfully before this Court for decision even if, standing alone, they otherwise might have been made the basis only of a writ of certiorari.

ANSWER TO STATEMENT OF THE CASE

Said statement first asserts for its premises, as bases for the arguments that follow, that:

> The City sued McGlone and the Casualty Company "on a statutory County Treasurer's Fidelity Bond given by McGlone as principal and the Casualty Company as surety (p. 2)***
>
> "It was in this capacity that the bond herein sued upon was given." (p. 3)

Our answers are:

(a) In executing the bond sued upon McGlone and the Company obligated themselves to the City, not merely as sureties, but as insurers of the performance of the following conditions by McGlone:

> "For paying over to his successor in office all such sums of money belonging to the City and County as shall be in his hands and to account for and turn over to his successor all monies deposited with him *for any cause whatsoever.*" (Section 105, 1927 Ed. of the City Charter; Appendix to Statement as to Jurisdiction, Exhibit C.)

Saint vs Wheeler, etc. Co., 95 Ala. 362; 36 A.S.R. 210
Empire State Surety Co. vs Lindenmeier, 54 colo. 497
Hurlburt vs Kephart, 50 Colo. 353
Curry vs Equitable Co., 27 Colo. App. 175, 186-188, 50 C. J. p. 80, 85, Sections 133-135.

As shown at length in our Statement as to Jurisdiction and on the face of the Motion to Dismiss herein, McGlone and the Company admitted and admit that these conditions were never performed and the decision of the Appellate Courts of Colorado have consistently followed and applied the "rule of strict accountability" in such cases, following that rule as it is stated in U. S. vs Prescott, 3 How., 578, ever since the question was first presented for decision in that state.

Gartley vs People, 24 Colo. 155
Gartley vs People, 28 Colo. 227
Babock vs the City of Rocky Ford, 25 Colo. App. 312
McClure vs La Plata County, 19 Colo. 122
Orman vs City of Pueblo, 8 Colo. 292
Patterson vs People, 98 Colo. 86
People vs Koenig, 99 Colo. 456

And in so doing said courts have held that the bond of such a treasurer "is the measure of his duties as treasurer and is the *contract* covering his duties and all those in his employ performing the duties of his office."

Gartley vs People, 24 Colo. 155, 163
Goss vs Board of Commissioners, 4 Colo. 468

(b) Instead of the bond sued on being a County Treasurer's bond, we respectfully submit it is as clearly as words could make it, the general official bond of McGlone as Manager of Revenue, as Ex Officio Treasurer of the City and County of Denver, a single body politic and corporate, to insure the faithful and prompt performance of his duties as treasurer of said City and County in the control, safekeeping and disbursement of ITS monies that "shall be in his hands for any cause whatsoever", whether in the performance of

his duties as City Treasurer, or when performing "the acts and duties required of county officers to be done by the constitution or by the general law as far as applicable" as provided by Section 2 of Article XX of the Colorado Constitution, Section 98, 1927 Ed. (Section 4) and Section 105, 1927 Ed. (Section 57) of the City Charter and by the words of said bond that are in literal compliance therewith.

As respects the functions and duties of such treasurers and the nature of the City as a single body corporate and politic, the case of Hilts vs Markey, 52 Colo. 382, cited in said Statement of the Case, has the following to say, at pages 384, 385 and 387:

> "In People v. Cassiday, 50 Colo. 503, at page 508, commenting on section 2 of article XX, which reads as follows:
>
> 'The officers of the city and county of Denver shall be such as by appointment or election may be provided for by the charter; and the jurisdiction, term of office, duties and qualifications of all such officers shall be such as in the charter may be provided; but every charter shall designate the officers who shall, respectively, perform the acts and duties required of county officers to be done by the constitution or by the general law, as far as applicable,' the following was declared:
>
> 'This section does not imply that there is no county or county government within that territory; there is therein a county and a county government, just as both exist in other portions of the state. Section 2 not only does not, in fact, set aside governmental duties and functions as to state and county affairs in this territory, it does not even pretend to do so, and by no stretch of the imagination can it fairly be held to do so. Neither is there any other provision of article XX which does it. The duties are fixed, power which created them. Section 2 expressly absolutely fixed, until changed by the same

recognizes that such duties are in existence and must be discharged, and forthwith proceeds to provide and declare by whom they shall be performed.' "

"Within the consolidated municipality of 'The City and County of Denver' there are two governmental entities, a county with county duties, as provided by the general state law, and the consolidated municipality of the city and county of Denver, with duties wholly of a local character; all of the duties of both these governmental entities are to be done by a single set of municipal officers, certain of whom are designated by the charter to discharge duties and functions other than those of a municipal character, but still to be performed in that territory; the duties of state and county governmental import being fixed by the constitution and general laws, concerning which the people of 'The City and County of Denver' have no power to legislate, and those pertaining to the municipal government of 'The City and County of Denver' being fixed by the charter. The word 'county,' as used in the designation 'The City and County of Denver,' has no significance so far as county duties, as such, and the discharge of them, be concerned; it is merely a part of a name, used to identify the consolidated municipality known as 'The City and County of Denver.' With equal propriety, and doubtless much less confusion, that entity might have been designated 'The Municipality of Denver' or 'The Corporation of Denver.' The designation 'The City and County of Denver' means exactly the same as would the names 'The Municipality of Denver' or 'The Corporation of Denver.' Such a designation could and would refer, in the very nature of things, to the municipality as a city, that is, to local affairs and local government, and there could then have been no doubt or confusion about its meaning."

Said "Statement of the Case" further asserts the following as premises for the argument that follows:

"In addition thereto he had given a *special* bond as treasurer or custodian of the Water Works funds with reference to moneys in his possession belonging to the Board of Water Commissioners (of the City of Denver) upon which the Fidelity and Deposit Company of Maryland was the surety (the general bond is Exhibit A at R. fols. 227-231, and the special bond is Exhibit B, at R. fols. 231-240). • • •

"Also the Manager of Revenue is Ex-officio City Treasurer, and the Treasurer of the *Board of Water Commissioners*, as well as Treasurer of *other Departments* and agencies of the City. It was as Treasurer of the Board of Water Commissioners that this special bond (Exhibit B referred to above) was given." (Emphasis supplied)

Our answer is:

Instead of the *additional* bond that was given by McGlone and the Fidelity & Deposit Company of Maryland in accordance with the provision therefor contained in Section 297 B 1927 Ed. (Section 294 D of the Charter), (Appendix to Statement as to Jurisdiction, Exhibit C) being a *special* bond, it was executed to the City in accordance with that provision as an additional bond and is designated in the opinion of the Supreme Court herein as a "supplemental bond" which clearly it was, since that is exactly what such a bond is, according to such authorities as the following:

Searcy vs Cullman Co. 196 Ala. 287, 71 So. 664
State vs Sparks, 109 W. Va. 394, 155 S. E. 172
City of Cudahy vs Firer, 215 Wis. 607; 255 N. W. 904
Evans vs Illinois Surety Co., 220 Ill. App. 216

Holland as Governor vs American Surety Co. of New York, Fla. 6 So. 2d, 280, 140 A.L.R. 145, 50 C. J. 155, Section 255

Stearns Suretyship, p. 135, 5 Couch on Insurance, 4382, Note 23

Said Statement of the Case next asserts that:

"Under the Charter there was created a department or quasi-corporation known as the Board

of Water Commissioners. This Board operates as a unit, agency or corporation carrying on the proprietary function of operating the City's Water Plant and of furnishing the City, its inhabitants and others with water at rates, charges or rentals fixed by the Board. It even charges the City for water furnished to the City, just as to any other user. It operates with great independence of the City. Just as in a Public Utilities Corporation, the members of the Board constitute its Board of Directors; (p. 3). We answer as follows:

(a) We respectfully submit that the foregoing statement is but a mass of contradictory assertions which refute themselves for the following reasons:

While a municipal corporation such as the "Home Rule" City and County of Denver may for the conduct of its local and municipal matters create departments and agencies, it could not, if it would, create a quasi-corporation "known as the Board of Water Commissioners", which could operate "with great independence of the City", and whose members would "constitute the Board of Directors", because the creation of such a corporation is not a local or municipal matter within the jurisdiction of a municipality, but one of general concern that is within the exclusive jurisdiction of the Legislature of the state.

Colorado Springs vs Hydro-Elec. Co., 57 Colo. 169, 184, 185:

> "Counsel for defendant relies on San Francisco v. Spring Valley Water Works, 48 Cal. 493, to sustain its contention. But that case simply determines that a private corporation authorized to furnish water for the city was not thus endowed with municipal powers, that such a corporation must be organized under the general laws of the state, and it is not within the constitutional power of the legislature to confer municipal powers upon a private corporation.

> "While functions of the municipality, such as the erection and maintenance of public utilities, are not governmental in their nature, yet they are strictly municipal purposes, that is to say they are intended specially and peculiarly to promote the comfort, convenience, safety and happiness of the citizens of the municipality, though perhaps not essential to the welfare of the general public."

See also Northern Colo. Irrigation Co. vs Arapahoe County, 95 Colo. 555

Section 297 B, 1927 Ed. of the City Charter, from which said Board derives its whole existence and authority, expressly provides that:

> "On the second Monday in June 1919 and every two years thereafter there shall be appointed by the Mayor one or two commissioners, as the case may be, for terms of six years each, to succeed those whose terms expire at said times. Said commissioners shall each receive a salary of Six Hundred Dollars per annum, payable as other salaries are paid. Each commissioner shll take an oath and give a bond in the sum of $5,000, conditioned and to be approved as provided by the Charter for bonds of other officers."

We respectfully submit that it is, therefore, apparent that the members of said Board are officers of the City and not directors of a corporation of any kind or nature, but that said Board is a purely "administrative agency or instrument employed exclusively in the control and management of the City's "Water Works plant and system".

In re Senate Bill 12. Colo. 188, 190, 191, providing for a Board of Public Works of the City of Denver:

> "The Board in question is made a department or branch of the city government * * * It is like the Board of Health, Fire and other departments permanent in its nature, but charged with certain continuous duties and vested with certain perpetual

powers. These duties and powers are extensive and in some respects unusual, but they relate exclusively to municipal affairs and are essentially functions of the municipal government. The Board has no separate existence, office or authority. It is an administrative agency or instrument employed exclusively in the control and management of the city's improvements and other interests. In no material respects, save as to the scope and extent of those duties and powers, does it essentially differ from other departments, by means of which the public interests are promoted and the public health, peace and welfare protected within the municipality."

(b) If said Board of Water Commissioners were in any sense the Board of Directors of a quasi-corporation that "operates with great independence of the city", necessarily it would be a "special commission", such as is expressly prohibited by Section 35 of Article V. of the Colorado Constitution, which provides that, "The General Assembly shall not delegate to any special commission, private corporation or association any power to make, supervise or interfere with any muncipal improvement, money, property or effects, whether held in trust or otherwise, or to levy any taxes or perform any municipal function whatever."

Holyoke vs Smith, 75 Colo. 286, 294
Milheim vs Moffat Tunnel Imp. Dist., 72 Colo. 268

In re Senate Bill 12 Colo. 188, 190, 191

(c) The statement that: "It even charges the City for water furnished to the City, just as any other user", would seem to be an insinuation that said Water Board, which they say is an agency of the city, has autocratic authority over its own principal, when said Section 297 B of the Charter expressly provides as follows:

"The City and County of Denver shall annually pay into the Water Works *Fund* for all water supplied it, for all *public* purposes and the rates for the use of such water by the City and County shall not exceed the rates which were charged the City and

County of Denver for said purposes by the Denver Union Water Company for the years 1917 and 1918; provided that the City and County of Denver shall not be required to pay for water furnished it by the City Ditch for the irrigation of parks and parkways and for filling reservoirs." (Emphasis supplied)

Uhler vs City of Olympia 87 Wash. 1, 151 Pac. 117, 121, 122:

"The city in meeting functions that are called governmental is taking from the city as a proprietor a thing held in its proprietary capacity. Therefore the general fund of the city may be charged, and the special fund credited, with a reasonable charge for the water used when so provided by the ordinance. The city as a governmental entity stands in the same relation to the system as a private citizen who is patronizing it."

Otherwise the money of the private users would be taken for the benefit of all the inhabitants of the city for the conduct of their governmental functions.

Mills vs City of Elsinore 93 Calif. App 753, 270 Pac. 224, 231.

The next assertion contained in said statement is:

"It (the Board) elects or appoints its own officers and agents, except that the City Treasurer is Ex-officio its Treasurer; and it has exclusive jurisdiction over the City's Water Works, property *and funds*. The only restraint as to the expenditure of its funds is that disbursements made must be upon warrants drawn by the Board and audited by the City Auditor, except that disbursements made for the payment of principal and interest of Water Works Bonds need not be upon warrants so drawn and audited."

We answer as follows:

The only authority of said Board is derived from Section 297 B, 1927 Ed. of the City's Charter, which provides that:

> "The moneys in said Water Works Fund shall not be used other than for the management, operation and maintenance of said Water Works System and Plant, including additions, extensions and betterments, and for payment into the sinking fund for the payment of interest on and the payment and redemption of the bonds for the acquisition of a Water Works System and Plant when issued.";
>
> "The Board shall • • • daily turn over to the Treasurer of said CITY AND COUNTY all money received" • • • ;
>
> "Moneys shall be paid out of said fund only upon the warrants of the Board, audited by the Auditor of the City and County of Denver, EXCEPT as to bonds and the interest thereon, which the Treasurer (of the City and County) SHALL pay without such warrant or audit," (Ex. C, Appendix to Statement as to Jurisdiction).

It would, therefore, appear to be too plain for argument that the word EXCEPT means what it says, to wit, "without including" (23 C. J. 179); that the word SHALL means MUST and is mandatory and that in performing the duties of receiving all such moneys as they are turned over to him daily by the Board, of placing them in the sinking and interest funds as required by Section 113, 1927 Ed. (Section 236) of the Charter, (Appendix to Statement as to Jurisdiction, Exhibit C); of depositing them in the banks of Denver that will pay the highest interest as required by said Section 106; and paying the interest on the bonds that were authorized by said ordinances, and which, as well as the bonds themselves, provided for their payment at the option of the bondholders AT the Banking House of Kountze Brothers in New York City, as alleged in the answers that were filed herein, said Treasurer had to, and could only, act as Treasurer of said City and County with full, complete and exclusive authority,

and that legally he could not do otherwise without violating not only the foregoing, but all of the other Chapter provisions that are set frth in Exhibit C of the Appendix to our Statement as to Jurisdiction and the bond contract that is the subject of this action.

Such has been the ruling of the Supreme Court of Colorado as respects the duties, responsibilities and obligations of such officials; and such we respectfully submit is too apparent to afford excuses and assertions to the contrary, such as are contained in and quoted hereinbefore from the "Statement of the Case" made to support the Motion to Dismiss filed herein by McGlone and the Company.

Moulton vs. McLean, 5 Colo. App. 454
Todd vs Elkins, 101 Colo. 269, 277
In re House Resolutions 12 Colo. 395
Meads vs. U. S. 81 Fed. 684
Smith vs U. S., 170 U. S. 372, 383.

The next assertions made in said statement are that:

> "The City brought this action in its name for the Board of Water Commissioners against McGlone and his surety to recover on his bond given as County Treasurer (not upon his bond as Treasurer of the Board of Water Commissioners)".

Upon the foundation of such shifting sands they undertake to raise a structure which falls as rapidly as they endeavor to erect it. But as the record shows, the action was brought in the name of and for the City and County of Denver against McGlone as a Manager of Revenue, Ex officio Treasurer of said City and County, who had converted and failed to deliver to his successor in office, certain of the City's moneys that were in his hands, as it had to be, to be done at all, and it was brought under the direction and at the request of the Mayor of the City, in compliance with Charter requirements.

On page 5 of said statement the actual issues raised by the Plaintiffs in Error (Appellees) for decision, are stated by themselves, as follows:

> "The defense of McGlone and the Casualty Company was twofold. One was that liability, if any, was upon McGlone's *special* bond given as Treasurer of the Board of Water Commissioners, and not upon the bond sued upon in this case, given by him as County Treasurer; and the other defense was that he sent the *Board's* funds, lost in this case, to Kountze Bros. upon the *direction* and *command* of the Board, his superiors, who had the exclusive control and jurisdiction over such funds. The Colorado Supreme Court decided the case for the appellees on the *latter* defense, without mentioning the first, though the result upon the first, if decided, should have been the same." (Emphasis supplied).

As shown hereinbefore and as the opinion shows on its face, said Court did mention the first defense and in so doing designated the so-called special bond for what it was, a supplemental bond; and instead of deciding the case for the appellees on the last defense, stated in the above quotation, based and made the decision to turn upon a pretended ORDER of said Board, which it held to be a CONTRACT and "VALID OBLIGATION", to which it gave sanction, even to the extent of ruling and deciding that it bound both the City and McGlone in such a forceful manner that the opinion says:

> "The existing circumstances left no field of choice for defendant Treasurer—his not to make reply, his not to reason why, his but to obey."

So, following the lead of that clean statement of release, we repeat with all the emphasis at our command: "Justified by contract",—and respectfully submit that, regardless of their failure to even mention, and apparent endeavor to avoid, the fact that the first time any contract of any kind was even thought of by anyone connected with the case was when said opinion was rendered, and that Plaintiffs' in Error (Appellees') own statement constitutes a complete refutation of their own theory and definitely establishes the contention of the City that said decision was based and made to turn upon an issue that was never presented to said Court for decision, to wit, that said McGlone was "justified

by contract", instead of a mere "command or direction" of "his superiors."

In this manner they have simply caught themselves in their own trap, but apparently not being disposed to openly concede that the case was so decided, they have only made matters all the worse for themselves by the following misleading representations. Said statement says:

> "The trial was *principally* upon an agreed statement of facts. Appellant *did not deny* any of the facts presented by the statement. It admitted the truth of *all* thereof but objected to certain portions thereof as not being material or relevant and as being in part conclusions." (Emphasis supplied).

Our answers are:

(a) Said assertions are not true. Reference to folios 250-262, page 104 of the record will show that, as shown in our Statement as to Jurisdiction, there was no Agreed Statement of Facts; and instead of the City having "admitted the truth of all thereof", it not only refused to sign or agree to, but objected to, all of the paragraphs and parts of paragraphs of the proffered Statement of Facts that had any bearing upon the defenses that were *based* upon the so-called "command or direction" of the Water Board that consisted only of the three letters that said opinion first designated an ORDER that constituted a CONTRACT; but when the offer was made to prove those paragraphs and parts of paragraphs the attorney for the City distinctly stated, "We admit that the witnesses would so testify *without* admitting the truth of the statements and we object on the grounds of immateriality and irrelevancy and in part as mere conclusions." (Record p. 104, folio 262).

And it will be seen that apart from those paragraphs and parts of paragraphs, neither the answers of the defendants in the Trial Court nor their proffered stipulation contained any semblance of defense other than a denial of liability coupled with an admission of every fact essential to the recovery by the plaintiff of everything it asked for in the Trial Court, which it had.

(b) It will be noticed that the first of the sentences above quoted contains an indirect admission that the trial was not *altogether* upon an Agreed Statement of Facts. This much, at least, has finally been conceded; and it will be noticed that it differs very materially from such statements as that, "The facts, AGREED UPON BY STIPULATION BETWEEN THE PARTIES, include the following"; and "It is further stipulated that", that are made use of in the opinion herein and followed by quotations from the very paragraphs and parts of paragraphs the truth of which the City refused to admit and to the offer to prove which it objected on the grounds above stated.

We, therefore, respectfully submit that the foregoing indirect admission that the case was not wholly tried upon an Agreed Statement of Facts begins to shed at least a modicum of light upon the whole situation and carries with it something of the reason why the author of the opinion herein was led so far astray in his interpretations. Not only so, it affords at last an occasion for comment which otherwise we were not privileged to make, but had hoped for when our "Statement as to Jurisdiction" was launched at such length under such compelling circumstances, and the reasons for which may now be made apparent.

Said Statement of the Case says:

> "Notwithstanding this, appellant's counsel assert in their statement herein that the Justices of the Supreme Court of Colorado, who heard and determined this cause against the City en banc without dissent, did so 'upon an issue that was not presented for decision; and they make assertions with unnecessary and unbecoming vituperation and malignity, as we believe, against the Colorado Justices. We pass over counsel's slurs against the Colorado Supreme Court Justices as beneath our dignity to answer; and also because the Justices of the Colorado Supreme Court are above the requirement of defense."

That last clause is one which, at last, we can and do wholeheartedly concur in with Plaintiffs in Error (Appelles),

with the added statement that they are not only individuals for whom we entertain the most kindly feelings and highest regard in every sense of those words, but against whom we have not and would not under any circumstances, and did not in our opening Statement as to Jurisdiction, in any respect cast any slurs or even mention except in the concluding statement, which was made for the definite purpose of showing, as best we could, just why they were led into concurrence in such an erroneous decision: Absent the privilege of making the *abstract of record* that was prepared for them by the Plaintiffs in Error (Appelles) herein a part of the record on appeal. It is to be noticed that our "Statement as of Jurisdiction" was addressed exclusively to the opinion that was its subject, and that we endeavored to subject that, and that alone, to such a withering fire that no smoke would follow the trail of what we hoped might be a flame of light whose burning heat might be an inducement for the Plaintiffs in Error (Appellees) to make greater concessions even than they now have made in their "Statement of the Case", and at the time that concluding statement was added to our Statement as to Jurisdiction we happened to know just what that abstract of record, that was so prepared, actually stated; and that at least some of said Justices had not read over the record and were by no means averse to seeing the case carried to this Court on appeal. And we now not only reiterate our firm conviction that the associate Justices who concurred in said opinion did not read over the record in said cause, but that it is our firm belief that the abstract of record that was filed in the case by Plaintiffs in Error (Appellees) so far shortcircuited the attention of the author of the opinion that it was deflected from the supplemental abstract of record that was filed by the City and that for that reason alone said opinion was couched in language which followed said abstract of record and which shows so plainly on its face the grievous errors that were committed.

ARGUMENT

IN THE STATE COURT THERE WAS DRAWN IN QUESTION THE VALIDITY OF ANY STATUTE OF THE STATE OF COLORADO

Upon this proposition the argument of McGlone and the Company opens with the statement that:

> "As shown above the Appellant did not in either of the Colorado courts contend that the command or direction of the Board of Water Cmmissioners to its Treasurer was a 'statute' within the meaning of that word, as used in Section 237 A of the Judicial Code. (U.S.C.A. Title 28, Section 344A)."

Certainly not, for the reason that there was not and is not one scintilla of evidence in the record of any such "command or direction", as shown in detail in our Statement as to Jurisdiction and as the letters upon which Plaintiffs in Error rely altogether for proof of such a "command or direction" show on their faces. No such "command or direction" was pleaded as or in any respect claimed to be an ORDER of the Board of Water Commissioners that constituted a CONTRACT, and not until the opinion of the Supreme Court of Colorado was announced was there ever so much as a suggestion of the existence of anything of the kind. But the decision and judgment in this case were based and made to turn solely upon the existence of such an order or contract, in favor of the validity of which alone said Court decided the case, and which, to have any existence at all, necessarily required the exercise of legislative discretion on the part of said Board, as shown at length in our Statement as to Jurisdiction.

Bragg City Special Road Dist. vs Missouri, 323 Mo. 990, 66 A. L. R. 1053, 1059.

This, we respectfully submit, the record makes perfectly apparent in the following manner:

The complaint in this case is bottomed upon the general bond contract of McGlone that was executed in pursuance of,

in strict compliance with and with especial reference to Section 105 and all the other sections of the City Charter that are set forth by copy in Exhibit C of the Appendix to our Statement as to Jurisdiction, all of which entered into and constituted a part thereof; and no letters of its Secretary or of said Water Board, City Council or anyone else save the people by charter amendment could change the conditions of said bond, or discharge the liability thereon of the signers thereof, by assuming control of the City's moneys in the hands of its Treasurer, or by binding him and the City for the deposit thereof in any place or under any conditions.

Moulton vs McLean, 5 Colo. App. 454
Todd vs. Elkins, 101 Colo. 269, 277.
In re House Resolution 12 Colo. 395
Smith vs U. S., 170 U. S. 372, 382, 383
Choate vs Trapp, 224 U. S. 665, 671, 673
Meads vs U. S., 81 Fed. 684, 687

Because concurrently with the execution of said general bond it was either forever nothing more than "a mere scrap of paper", or the City became thereby vested with a definite right to have the conditions thereof performed in strict accordance with the letter thereof; and being a perfectly valid bond when executed, as it shows on its face it was and is, the City could not be deprived of that vested right without being deprived of its contract property right, in violation of the due process clause of the Fourteenth Amendment of the United States Constitution.

Steamship Co. vs Joliffe, 69 U. S., 2 Wall. 450
Coombes vs. Getz, 285 U. S. 434, 52 S. Ct. 435
Forbes Pioneer Boat Line vs Board of Commissioners, 258 U. S. 338; 42 S. Ct. 325
Lynch vs. U. S., 54 292, 55 U. S. 571, 577, S. Ct. 840, 844
Murray vs Charleston, 96 U. S. 432
Choate vs Trapp, supra

In their answers Plaintiffs in Error (Appellees) admitted McGlone's failure to perform said conditions, but denied liability, and alleged as a defense that McGlone:

"sent the Board's (?) funds, lost in this case, to Kountze Brothers, upon the direction and command

> of the Board, his superiors, who had exclusive control and jurisdiction over such funds",

according to their own Statement of the Case that is now made in support of their Motion to Dismiss (Statement of the Case p. 5).

The only evidence they offered to support that defense was the three letters to which the opinion herein refers, copies of two of which are shown on the face thereof, and all of which are set forth in our Statement as to Jurisdiction as the "Statute of the State of Colorado, the Validity of which is Involved", and at pages 63 and 64 of the Record. To their admission in evidence the City objected on the grounds of their immateriality and irrelevancy (Record page 104, folio 262), and the Trial Court so held them to be in giving the judgment to the City for just what it asked for. Consequently when the Supreme Court of Colorado decided the case, it had presented to it for decision the issue as to whether McGlone was liable for his "failure to turn over to his successor in office" the moneys that were lost (which he admitted that he did not do) as the result of his having made the Kountze Brothers Banking House his depository thereof, in violation of the terms of his said bond and said Charter provisions, or whether he was relieved of liability for what he had done and failed to do, in violation of the terms of said bond and charter provision by a "command or direction" of said Board of Water Commissioners, acting simply as his "superior officers."

That was the issue actually presented for decision, that the Plaintiffs in Error (Appellees) now admit by their own Statement of the case as shown hereinbefore.

For the decision of said issue necessarily said Court had to consider and construe all of the terms of said bond contract, together with said letters, and could not possibly decide the issue so presented for decision without considering and construing them all together and, in connection therewith, also construing said Charter provisions, of which said Court was bound to take judicial notice, and all of which were before it and as an integral part of the contract, if any, so to be considered and construed, as shown hereinbefore. But, instead of de-

ciding the issues so presented to it for decision, said Court based its decision of the case upon an issue that was not presented to it for decision, and in so doing ruled that said letters were an ORDER of the Board of Water Commissioners; that said Board was McGlone's "superior officers", and that its said order constituted a contract "and valid obligation" in favor of the validity of which it decided, by ruling and holding that both the City and McGlone were bound thereby to the full extent that McGlone, as Treasurer, was placed in the position wherein there was "left no field of choice for defendant Treasurer—his not to make reply, his not to reason why, but to obey". Said order was so ruled to be a contract of such binding force that had said McGlone failed to transmit said moneys to Kountze Brothers he would indeed have breached the general bond contract that was the subject of the controversy itself. (See Opinion Appendix to our Statement as to Jurisdiction, Exhibit A).

It is next argued that:

> "Appellant has been unable and has failed to comply with Subdivision 1 of Rule 12 of the Rues of this Court providing—'*** The Statement shall refer distinctly to the statutory provision believed to sustain jurisdiction, (b) to the statute of the state * * * the validity of which is involved (giving the volume and page where the statute may be found in the official edition) setting out verbatim or appropriately summarizing its pertinent provisions.' "

If this calls for any answer at all, about all that can be said is that Plaintiffs in Error (Appellees) have not only overlooked the fact that the statute of the state "the validity of which is involved" is referred to distinctly and set out verbatim in our Statement as to Jurisdiction, that there is no Official Edition in the volume and page of which the statute may be found, and that this argument inferentially attributes to this Court the adoption of a rule that would be impossible of performance, in such case, regardless of the fact that the "volume and page * * in the official edition" mentioned parenthetically in said Rule is required for the Court's convenience only in cases where there are Official Editions to which the Court may be referred.

Finally, it is argued that:

> "In any event the said direction or command was not a 'statute'. It did not directly affect any part of the public to whom the Board offers water services or with whom it deals, as a city department, agency or corporation. It was simply an *administrative* matter *within the workings of the Board itself.*" (Emphasis supplied).

Our answer is, then, how could it possibly be a contract that would bind the City and to which the Supreme Court of Colorado could lend the sanction of that state for the purpose of depriving the City of its vested property rights in the bond contract sued upon in this action?

Certainly if the so-called "command or direction" "was simply an administrative matter within the working of the Board itself" it was not such a "mutual agreement between two or more competent parties for a valuable consideration touching on lawful subject matter," and, therefore, not an order that constituted a contract such as that to which the Supreme Court of Colorado has given that state's sanction.

Wherefore, according to the foregoing assertion, to which the Plaintiffs in Error (Appellees) are now committed, said Supreme Court did in reality base the decision of this case upon an asserted order of said Water Board that was ruled to be a contract, the existence of which said Plaintiffs in Error (Appellees) themselves never dreamed and for which, even now, they do not make any claim ever to have had any existence whatever.

As the last argument upon this proposition, Plaintiffs in Error (Appellees) say:

> "The record herein is wholly devoid of any showing that as specified in Appellant's Assignments of Error the decision of the Colorado Supreme Court was a suit 'where is drawn in question the validity of any statute on the ground of its being repugnant to the Constitution.'"

But the Supreme Court of Colorado did hold and rule that the letters which the opinion herein quotes, and to which it refers as "containing the contract arrangements already described", and which within themselves embrace everything that is contained in the record respecting any arrangements of any kind whatever, was a valid order of the Board of Water Commissioners that constituted a binding contract of the nature hereinbefore stated, and, to be such an order or contract at all, necessarily it had to be the result of and constitute an Act of the said Board that was legislative in character.

Bragg City Special Road Dist. vs Missouri, 323 Mo. 990, 66 A. L. R. 1053, 1057.

Such being the case, the record does show in the most emphatic manner that, as specified in Appellant's Assignments of Error, the decision of the Colorado Supreme Court was a suit "where is drawn in question the validity of any statute on the ground of its being repugnant to the Constitution", because the sum and substance of the whole situation, as shown by the record herein is as follows:

The Council of Denver enacted three ordinances, which were approved by the taxpaying electors, and authorized the issuance of certain bonds, which were made payable, and which showed on their faces that they were payable, at the option of the bondholders, AT Kountze Brothers Banking House in New York City.

On *August 3, 1927* Kountze Brothers addressed a letter to Hiram E. Hilts, Sec'y of the Board of Water Commissioners, in which they indicated a disposition "to have our firm named as *fiscal agents* for the *payment* of the interest on these bonds in New York", and stating that, "If funds to pay this interest are placed with us 15 days prior to the maturity of the coupons we will make no commission charge for paying these obligations". (Record page 65, folio 242).

Thereafter on *November 30, 1930,* the then Secretary of said Board addressed a letter to Kountze Brothers, in which he said that:

"We find that the funds to cover the interest coupons on the Denver Municipal Refunding Water Bonds, Series 1927, due December 1, have not been *forwarded* to you as per your letter of August 3, 1927, 15 days prior to the interest *paying* date.

We are sorry that this instalment was overlooked and will assure you that in the future the funds will be there in proper time."

(Record page 63, folio 240)

On the same date said Secretary addressed a letter to Clem W. Collins, the predecessor of McGlone as treasurer, saying:

"We are enclosing a copy of a letter from Kountze Brothers, dated August 3, 1927, relative to the *payment* of the interest on Denver Municipal Refunding Water Bonds, Series 1927, and also a copy of a letter we are this day writing to them.

Will you kindly be governed accordingly."

(Record page 64, folio 241).

Notwithstanding that Section 297B, 1927 Edition (Section 264 D) of the City Charter, from which the Board derives its only authority, expressly provides that "All action by the Board shall be taken by a majority of the Board and not otherwise", and that the auditor "shall sign and register all contracts", and there was not even an offer to prove that said letters to and from said Secretaries were either of them ever acted upon, by the Board, and the letters themselves constitute the only evidence that is contained in the record respecing any dealings of any kind by anyone with Kountze Brothers, other than the deposit of the City's money with them by its Treasurer, the opinion herein says:

"The record shows, however, that Denver entered into a *contract* with Kountze Bros. whereby the latter would act as *paying* agent IN New York City for Denver in respect to the three bond issues.

> The *consideration* for Kountze Bros. so acting was that Denver would DEPOSIT with them the sums necessary to pay the interest coupons * * *" (Emphasis supplied).

Said opinion further says that the letters to which it refers, and to which reference is had above, were written, and that the one written August 3, 1927 to Hiram E. Hilts was one "containing the contract arrangements already described"; that McGlone, "like his predecessor, made remittances to Kountze Brothers because he *found* express instructions from the Denver Board of Water Commissioners directing his office to make the remittances in accordance with the terms of an *agreement* made with said New York Banking House"; that: "In this case the City * * was under valid obligation to Kountze Bros. to make remittances to cover the estimated presentation of inerest coupons for payment IN New York City at least 15 days before the due date of the coupons"; that: "The Treasurer in turn was *not* merely *authorized* but directed by ordinance of the City Council to pay both the principal of the bonds and also the interest coupons (leaving out the provision of the ordinances that said bonds and coupons were to be made payable, and as shown on the face of the bonds themselves were made payable, at the option of the bondholders, *at* Kountze Bros. instead of IN New York City as the opinion says) and unlike other payments — — was expressly relieved of the necessity of obtaining warrants therefor. * * Finally the Treasurer was expressly directed by his superior officers, the Denver Board of Water Commissioners, to make remittances to Kountze Bros. in such manner as to comply with the City's contract with that banking house." (See opinion, Exhibit C, Appendix to our Statement as to Jurisdiction), all in total disregard of such charter provisions as Section 297B and Section 102 of the City Charter which do not merely authorize, but mandatorially require, that said Treasurer SHALL pay such interest coupons without warrant or order, and as shown at length hereinbefore, the Charter casts the whole responsibility for the control, safekeeping and disbursement of the City's money upon the Treasurer himself and expressly requires that such money shall be deposited in Denver banks that pay the highest interest and give depositary bonds for the security

of the City and County, executed by sureties other than the surety on the Treasurer's bond.

And Section 7, 1927 Ed. (Sec. 29) of the City Charter which expressly provides that:

> "All bonds, contracts or other instruments of writing requiring the assent of the City and County shall be subscribed by the Mayor, or Acting Mayor, as the case may be, under the seal of the City and County and attested by the Clerk".

> And the Supreme Court of the State of Colorado: "•••has consistently held that contracts executed by municipal corporations in which there was a failure to comply with the mandatory provision of the applicable statutes or charter are void."

> Swedlund vs Denver Bank, 108 Colo. 400, 408.

Within the time provided therein, and in accordance with Rules 48 and 49 of the Supreme Court of Colorado, which provide that:

> "A petition for rehearing • • • may be filed within fifteen days after the filing of the opinion of the Court and shall briefly state the points claimed to have been overlooked or misapprehended by the Court, with proper reference to the record and the authorities relied upon • • • . No answer will be permitted and no action will be taken save to grant or deny the rehearing,"

the City filed its petition for rehearing, which said petition not only specificall yand in detail called the Court's attention to just how it overlooked, misapprehended and misapplied the law and facts of the case in so construing said ordinances and letters, and in saying that McGlone had "made the remittances in accordance with the terms of an agreement made with the New York Banking House", but emphasized that by its decision in this case this Court had drafted for the City and County of Denver a contract, which would be void on

account of its ultra vires contrary to Section 106 of the Charter, in all the respects set forth in paragraph four of said petition, and in particular because: "the contract in this case, if any were atempted to be made, was made by either the Board of Water Commissioners or the City Council contrary to Charter directions", and all of said charter provisions were before the Court and of all of which it was bound to take judicial notice as hereinafter shown.

Said petition called the Court's attention to the fact that "the effect of this decision is to utterly repeal" said Section 106 "of the Denver City Charter • • • ", that "the Treasurer in his own discretion chose to violate Section 106, and if the present decision stands that section of the Denver City Charter has been repealed by City Ordinance and by correspondence between a city employee and Kountze Brothers"; that "no Ordinance or contract could be made by any city official nor can any rule of law properly be made by this Court operating to repeal the Charter adopted by the people of Denver to govern their Treasurer and his obligations;" that "the bond required by the Charter and actually executed by Plaintiff in Error herein was to insure the fulfillment of that positive obligation"; that "The Court has mistaken, overlooked and misapprehended the effect of the ordinances of the City and the directions of its Board of Water Commissioners regarding making funds available at Kountze Brothers for the payment of the obligations involved herein"; that "This Court has overlooked Section 297 B of the Charter of the City and County of Denver • • •, which clearly shows that the Treasurer is not subject to instructions from the Board of Water Commissioners", calling especial attention to the mandatory requirement of the exception contained in said Section "as to the bonds and the interest thereon which the Treasurer shall pay without such warrant or audit • • "; called the Court's attention to the fact that the Court had overlooked or misapprehended the nature of the Plaintiffs' in Error (Appellees') bond contract sued upon and Section 105 of the Charter of Denver, stating the particulars; and in its seventh paragraph said petition, with emphasis, called said Court's attention to the fact that it had overlooked or misapprehended the point, "That if the said opinion is not withdrawn and the judgment of the Trial Court affirmed, the City and County of Denver, Defendant in Error, will be deprived

of its property without due process of law, in violation of those provisions of Sec. 1 of Art. XIV of the Constitution of the United States that provides * * 'Nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law'," for the resons set forth in our assignments of errors herein, among which was that "Any judgment entered upon or in pursuance of said opinion would deprive the Defendant in Error of its private contract property rights to recover against the said Continental Casualty Company as insurer and against said McGlone as principal, upon their respective promises to pay said Defendant in Error the sums of money belonging to it, which they admit were in the hands of and were deposited with the said McGlone during his term of office as Treasurer of said Defendant in Error, and for which he failed to account or pay or turn over to his successor in office."

And said petition concluded with the statement that any judgment entered upon or in pursuantance of said opinion would *for reasons hereinbefore stated* amount to a mere arbitrary and capricious exercise of power and would be in conflict with those fundamental principles which have been established in our system of jurisprudence for the protection and enforcement of private rights."

For the foregoing reasons we respectfully submit that not only was "there drawn in question the validity of a statute of the State of Colorado", but that it was done in such an explicit and emphatic manner that the Supreme Court of Colorado could not escape notice of that fact in any other manner than by a total failure to read over the City's petition for rehearing, before denying it, and that said statute was drawn in question on the very definitely specified ground that, as construed and applied, the said decision would violate the United States Constitution, and clearly stated reasons that entitle the City to appeal as a matter of right; because, in so ruling and holding that said letters were an order of said Board acting in the capacity of McGlone's "superior officers" that con-

stituted a contract entered into by said Board in behalf of both the City and McGlone, whereby they were bound as stated in said opinion, we respectfully submit the Supreme Court of Colorado did exactly what the Supreme Court of Appeals of Virginia did when it gave the sanction of that state to a void instrument as a law of said state, in that said letters could not possibly be an order of said Board that constituted a contract, without at the same time time being an act legislative in character, as shown hereinbefore, and such being the case it was a "statute of any state" within the meaning of Section 237 A of the Judicial Code, because:

Williams vs. Bruffy, 96 U. S. 176:

> "Any enactment from whatever source originating, to which a state gives the force of law, is a statute of the state within the meaning of the clause cited relating to the jurisdiction of this court."

Ford vs. Surget, 97 U. S. 594, 602, 603
Eliza Stevens vs. Groffith, 111 U. S. 49
Ex parte Vir. 100, U. S. 346, 347
John P. King Co. vs. City Council of Augusta, 277 U. S. 100, 48 S. Ct. 489

Hamilton vs. Regents Univ. Calif. 293 U. S. 245, 55 S. Ct. 197, 202

Standard Computing Scale Co. vs. Farrell 249 U. S. 571, 577

Raymond vs. Chicago Traction Co., 207 U. S. 20, 35, 36

Miller vs. Schoene, 276 U. S. 272, 48 S. Ct. 246

Demorest vs. City Bank Farmers Trust Co., 321 U. S. 36, 64 S. Ct. 384

THERE WAS A SHOWING THAT THE STATE HAS DEPRIVED APPELLANT OF PROPERTY WITHOUT DUE PROCESS OF LAW

To support the contrary proposition the argument is advanced that:

> "Appellant contends that the state has deprived it of property without due process of law * * * for the alleged reason only, that its Supreme Court has erroneously decided this cause without reference to any Federal Constitutional question";

and that:

> "Appellant parenthetically states in its said petition for rehearing that the Court takes judical notice of this Charter provision. This statement is erroneous. The law is that *Colorado courts* do not take judicial notice of town or city ordinances *and Charters* and they must be pleaded and proven. (See Fay vs. Collins, 40 Colo. 262, 90 Pac. 912 and cases there cited)" (Emphasis supplied).

About the only comment that we know how to make upon these statements is that while it might seem possible to understand how a child could read the case cited and overlook the fact that it had to do only with an ordinance which, as a matter of course, has to be pleaded and proved, it is beyond our comprehension that experienced lawyers could be so negligent as to state to this Court that, "The law is that Colorado courts do not take judicial notice of town and city ordinances and *Charters,*" when it is so universally known that such Charters, and in particular the Charter of Denver, is taken judicial notice of by the courts of Colorado; and that, when it comes to the "statute of any state", since the days of Owings vs. Hull, 9 Peters 606, 625, it has been the announced rule of this Court and the lower Federal courts that such statutes are "to be taken judicial notice of, in the same manner as the laws of the United States are taken notice of by these courts."

Denver Tramway Co. vs. Carson, 21 Colo. App. 604, 617,618.

Shimmel vs. People, 108 Colo. 592, 600
Seattle etc. Ry. Co. of Seattle, 190 Fed. 75
Jackson vs. Denver etc. Co., Fed. 2d 457
L. & N. Ry. Co. vs. Palmes, 20 How. 227, 234, 15 L. Ed. 896

Surely Plaintiffs in Error (Appellees) must know that the Charter of the City of Denver is no mere statutory Charter enacted by the legislature of the state, but that it was, by the amendment of Article XX of the Colorado Constitution that was adopted in 1912, "ratified, affirmed and validated in each and every provision thereof" not in conflict with the article, and has been held by the Supreme Court of Colorado to have been thereby, "in substantial effect, written in the Constitution" itself.

Denver Telegraph Co., 67 Colo. 225, 234

So, basing our assertions upon the unambiguous words of Section 6 of Article XX of the Colorado Constitution and the decisions of its Supreme Court to which we have referred, we repeat, with emphasis, that the Colorado Courts do indeed take judicial notice of Charter provisions, and in particular that part of the Constitution of the State known as the Charter of the "Home Rule" City and County of Denver.

The proposition that:

> "Appellant contends that the state has deprived it of property without the due process of law * * for the alleged reason only that its Supreme Court has erroneously decided this cause without reference to any Federal Constitution question",

is one which we respectfully submit not only runs parallel to, but is equivalent of, the one last above discussed, in being altogether without foundation.

The proposition which Plaintiffs in Error (Appellees) have submitted for consideration is that there is "No showing that the state has deprived Appellant of any property without due process of law," but the seventh paragraph of the petition for rehearing, that was filed in the Supreme Court of Colorado (Record pp. 108-117), is, as shown hereinbefore, expressly based on that particular ground.

The question before the Court for decision at the pres-

ent time is whether our "Statement as to Jurisdiction" entitles us to an appeal as a matter of right, under Section 237 A of the Judical Code. We respectfully submit that that statement and the record herein show that the validity of the order of the Board of Water Commissioners that the Supreme Court of Colorado construed to be a contract, was inseparably connected with, and a part of, the contract so asserted and held valid by the opinion of said Supreme Court, because the validity of that contract could not be so sanctioned without considering and construing said Charter provisions and bonded contract sued upon. The question whether the bond contract was impaired and the City thereby deprived of its vested property rights thereunder by said order of the Board of Water Commissioners was, therefore, necessarily involved and was a Federal question without the consideration of which the decision could not have been made at all.

The consequence is, that this Federal question, which was first made an issue in the case by said opinion, appears on its face, and it was not necessary or essential that it should be specially set up in that Court at all in order to raise the question that the state has deprived Appellant of property without due process of law, because:

> "Wherever rights, acknowledged and protected by the Constitution of the United States, are denied or invaded by state legislation, which is sustained by the judgment of a state court, this court is authorized to interfere. Its jurisdiction, therefore, to examine such judgment cannot be defeated by showing that the record does not in direct terms refer to some constitutional provision, presented. The true judicial test is whether it appears that such question was decided adversely to the Federal right.
>
> The provision in that Constition, that no state shall pass a law imparing the obligation of contracts, is a limitation upon the taxing power of a state as well as upon all its legislation, whatever form it may assume. Therefore, a law changing the stipulations of a contract or relieving a debtor from a strict and literal compliance with its re-

quirements, enacted by a state in the exercise of that power, is unconstitutional and void."

Murray vs. Charleston, 96 U. S. 432
Under Section 237 A of the Judical Code

"It may be said to be the result of the rulings in this Court that if the Federal question appears in the record in the State Court and was decided, or the decision thereof was necessarily involved in the case, the fact that it was not specially set up will not preclude the right of review here."
Harding vs. Ill., 196 U. S. 78, 85, 86

Columbia Water Power Co., vs. Columbia S. R. Co., 172 U. S. 475 and cases cited on page 488.

We therefore, respectfully submit that the case is one wherein the question whether the state has deprived Appellant of its property without due process of law was clearly shown, because:

First, that question was necessarily considered and was the very question upon which the whole decision was dependant and appears upon the face of the opinion itself; and

Second, it was clearly and distinctly called to that Court's attention by the City's petition for rehearing.

And the case is, therefore, one of that class of cases: " • • • in which this Court has held that in determining whether a state law has impared a contract, it must decide for itself whether there was a contract and whether the law as enforced by the state court impairs it. It often happens that the law of a state constitutes a part of a contract and to make the constitutional inhibition effective, this court must exercise an independent judgment in deciding as to validity and construction of the law and the existence and terms of the contract."

Tidal Oil Co. vs. Flanagan, 263 U. S. 444, 44 S. Ct.197, 199

"Where it becomes necessary to consider whether a state is depriving, or attempting to

> deprive, *a litigant of property without due process* of law, in violation of the Fourteenth Amendment, and the question turns on the existance and terms of an asserted contract, this court determines for itself whether there is a contract and what are its terms."

Railway Commission vs. Eastern Texas Ry. Co., 264 U. S. 79, 44 S. Ct. 247

Forbes Pioneer Boat Line vs. County Commissioners, 258 U. S. 338, 42 S. Ct. 325

Home Insurance Co. vs. Dick, 281 U. S. 398, 50 S. Ct. 338

Municipal Investors Assoc. vs. City of Birmingham, 316 U. S. 153, 62 S. Ct. 975

Coppage vs. Kansas, 236 U. S. 1, 15

Fiske vs. Kansas, 274 U. S. 380, 47 S. Ct. 655

People ex rel Zimmerman, 278 U. S. 63, 49 S. Ct. 61

In its construction, application and enforcement of said pretended order of the Board of Water Commissioners the Supreme Court of Colorado has given the sanction of that state to said order as a law of said state.

At its first opportunity the City in its petition for rehearing distinctly and definitely drew in question the validity of said order as so construed and applied, and as shown hereinbefore that constitutional question is apparent on the face of said opinion itself. The record has been properly brought to this Court on appeal, under Section 237 A of the Judicial Code as Amended, because the case involves the constitutionality of said order which, as hereinbefore shown, is a "statute" of said state within the meaning of that section.

In its assignments of error the city has included some assignments which, if standing alone, otherwise might have been made the basis only of a writ of certiorari, but accompanying a record properly brought up on the ground that the case involves the constitutionality of the statute, said errors are properly assigned and call for decision.

Prudential Insurance Co. of America vs. Cheek, 259 U. S. 530, 42 S. Ct. 517

Brinkerhoff-Faris etc. Co. vs. Hill, 281 U. S. 673, 50 S. Ct. 451

Wherefore, for each and all of the foregoing reasons, we respectfully submit that the Motion to Dismiss filed herein should be denied.

Respectfully submitted,

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Attorneys for City and County of Denver, Appellant.

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MAR 22 1946
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 984

CITY AND COUNTY OF DENVER, A MUNICIPAL CORPORATION,

Appellant,

vs.

WILLIAM F. McGLONE AND CONTINENTAL CASUALTY COMPANY

APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

MOTION TO DISMISS AND STATEMENT OPPOSING JURISDICTION

WALTER W. BLOOD,
FRANK N. BANCROFT,
Counsel for Appellees.

BANCROFT, BLOOD & LAWS,
Of Counsel.

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SUPREME COURT OF THE STATE OF COLORADO

No. 15343

WILLIAM F. McGLONE AND CONTINENTAL CASUALTY COMPANY, A CORPORATION,
Plaintiffs in Error,

vs.

CITY AND COUNTY OF DENVER, A MUNICIPAL CORPORATION,
Defendant in Error

Error to the District Court of the City and County of Denver

Honorable Henry A. Hicks, Judge

MOTION TO DISMISS APPEAL

The appellees, William F. McGlone and Continental Casualty Company, move to dismiss the appeal herein, for the following reasons, to-wit:

I

It does not appear that, in this cause in the Supreme Court of the State of Colorado, or in the District Court of the City and County of Denver, Colorado, there was

drawn in question the validity of any law or statute of the State of Colorado on the ground of its being repugnant to the Constitution of the United States.

II

It does not appear that, in this cause, the State of Colorado has deprived the City and County of Denver, appellant herein, of any property without due process of law; nor denied to it the equal protection of the laws.

III

That the only questions involved herein are questions local to Colorado, pertaining to its statutory and decisional law, in which no Federal questions have arisen; that the decision herein of the Supreme Court of the State of Colorado thereon is not without support; and that the said decision is binding upon, and should be followed by, all Federal Courts, including the Supreme Court, upon the questions of local law in the said State Court decided and determined.

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SUPREME COURT OF THE STATE OF COLORADO

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CITY AND COUNTY OF DENVER, A MUNICIPAL CORPORATION,

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Error to the District Court of the City and County of Denver

Honorable Henry A. Hicks, Judge

STATEMENT OF APPELLEES SUPPORTING MOTION TO DISMISS APPEAL, AND MAKING AGAINST THE JURISDICTION ASSERTED BY APPELLANT.

I

Contentions of Appellees

The appellees contend, as stated in their Motion to Dismiss the Appeal, as follows:

(1) The appellant did not raise the question in the Courts in Colorado that the said State has, by any statute, deprived the appellant of its property.

(2) The State of Colorado, by the decision of its Supreme Court from which an appeal has been taken herein, did not take from appellant any of its property without due process of law; and in this respect the said decision is supported by the law of the State of Colorado, as well as of other jurisdictions.

(3) In this controversy, only questions of local substantive law were involved, and as to them the decision thereon of the Supreme Court of the State of Colorado, its highest appellate court, is binding upon and should be followed by all Federal Courts.

II

Statement of Case

The City and County of Denver, hereinafter called the "appellant" or the "City," sued McGlone and Continental Casualty Company, hereinafter called either the "appellees" collectively, or "McGlone" and the "Casualty Company" separately, on a statutory County Treasurer's Fidelity Bond given by McGlone as principal and the Casualty Company as surety. The bond was required from McGlone under Section 105, 1927 Edition (Section 57) of the Charter of the City and County of Denver, conditioned "as (required) by the General Statutes (of the State of Colorado) relating to bonds of *County* Treasurers" (see Charter provision in Exhibit C attached to appellant's statement). In addition thereto he had given a special bond as treasurer or custodian of the Water Works funds with reference to moneys in his possession belonging to the Board of Water Commissioners (of the City of Denver) upon which the Fidelity and Deposit Company of Maryland was the surety (the general bond is Exhibit A at R. fols. 227-231, and the special bond is Exhibit B at R. fols. 231-240).

The City and County of Denver is known in Colorado as a "Home Rule" City. Pursuant to a Colorado Constitutional Amendment, it has its own Charter under which it performs both County functions, as provided by the State laws, and purely local or City functions, both governmental and proprietary, as provided by its own Charter and Ordinances (see *Hilts* v. *Markey*, 52 Colo. 382, 387, 122 Pac. 54). Thus, its Manager of Revenue is Ex-officio, to answer the requirements of State law, the County Assessor and the County Treasurer (see Exhibit C attached to appellant's statement, Section 98, 1927 Edition of Charter (Section 4)). It was in this capacity that the bond herein sued upon was given. Also, the Manager of Revenue is Ex-officio the City Treasurer, and the Treasurer of the Board of Water Commissioners, as well as Treasurer of other Departments and Agencies of the City. It was as Treasurer of the Board of Water Commissioners that his special bond (Exhibit B referred to above) was given.

Under the Charter there was created a department or quasi-corporation known as the Board of Water Commissioners. This Board operates as a unit, agency or corporation carrying on the proprietary function of operating the City's Water Plant and of furnishing the City, its inhabitants and others with water at rates, charges or rentals fixed by the Board. It even charges the City for water furnished to the City, just as to any other user. It operates with great independence of the City. Just as in a Public Utilities Corporation, the members of the Board constitute its Board of Directors; it elects or appoints its own officers and agents, except that the City Treasurer is Ex-officio its Treasurer; and it has exclusive jurisdiction over the City's Water Works, property *and funds.* The only restraint as to the expenditure of its funds is that disbursements made must be upon warrants drawn by the Board and audited by the City Auditor, except that dis-

bursements made for the payment of principal and interest of Water Works Bonds need not be upon warrants so drawn or audited. The Board, through its own officers, may contract with reference to its own affairs, and such contracts need not be signed by the Mayor, like City contracts, as asserted by the appellant herein. It also may sue, in Water Works matters, though such suits must be brought in the name of the City by the City Attorney. This appeal is probably being so prosecuted, as the funds involved were the Board of Water Commissioners' funds. Except for the few limitations herein noted, the Board of Water Commissioners has all of the powers and attributes that a privately owned Public Utilities Corporation would have owning and operating Denver's Water Plant (see Exhibit 1 attached hereto, the same being a more complete quotation of Section 297B, of the 1927 Edition of the City's Charter (Section 264D) than that contained in Exhibit C attached to appellant's statement).

The City brought this action in its name for the Board of Water Commissioners against McGlone and his surety to recover on his bond given as *County* Treasurer (not upon his bond given as Treasurer of the Board of Water Commissioners) because some of the Board's funds which he had sent to Kountze Brothers, Bankers, in New York, to pay coupons payable there and maturing on Water Works Bonds, were lost through the failure and closing of the said Bank. The defense of McGlone and the Casualty Company was twofold. One was that liability, if any, was upon McGlone's special bond given as Treasurer of the Board of Water Commissioners, and not upon the bond sued upon in this case given by him as County Treasurer; and the other defense was that he sent the Board's funds, lost in this case, to Kountze Brothers, upon the direction and command of the Board, his superiors, who had the exclusive control and jurisdiction over such funds. The Colorado

Supreme Court decided the case for the appellees on the latter defense without mentioning the first, though the result upon the first, if decided, should have been the same. In the trial court, the District Court of the City and County of Denver, Colorado, appellant presented its case upon the doctrine or theory of "strict accountability" as evidenced by *Patterson* v. *People*, 98 Colo. 86, 53 Pac. (2d) 1187, and *People* v. *Koenig*, 99 Colo. 456, 63 Pac. (2d) 1235. At the time of the trial there had been no Colorado decisional exception to the rule announced in those two cases, though appellees contended that this cause was an exception to the said doctrine. Between the time of the trial and the determination of this case in the Colorado Supreme Court, that Court recognized and announced the exception, for which appellees had contended and were contending, in *McBride* v. *People*, 111 Colo. 577, 144 Pac. (2d) 777.

The trial was principally upon an agreed statement of facts. Appellant did not deny any of the facts presented by the statement. It admitted the truth of all thereof, but objected to certain portions as not being material or relevant and as being in part conclusions. These portions were admitted subject to appellant's objections (see R.—— fols. 250-262). Included in the portions so objected to were the letters which are Exhibits C, D and E (R. 63, 64 and 65, fols. 240, 241 and 242). Under Rule 43(c) of the Colorado Rules of Civil Procedure, which is identical with Rule 43(c) of the Federal Rules of Procedure, these three letters thus became part of the record of the cause for consideration by the Colorado Supreme Court. Notwithstanding this, appellant's counsel assert, in their statement herein, that the Justices of the Colorado Supreme Court who heard and determined this cause against the City *en banc*, without any dissent, did so "upon an issue that was not presented for decision"; and they make their assertions with unnecessary and unbecoming vituperation

and malignity, as we believe, against the Colorado Justices. We pass over counsel's slurs against the Colorado Supreme Court Justices as beneath our dignity to answer; and also because the Justices of the Colorado Supreme Court are above the requirement of defense.

Upon the offering of this evidence, the appellant's only objections were as above noted. It was contending for the strict accountability doctrine, without any exception, and so it did not then contend or object to this evidence on the ground, first asserted in this appeal, that the command or the direction of the Board of Water Commissioners to its Treasurer was an "order, law or statute" repugnant to the Constitution of the United States and particularly to Section 1 of Article XIV. In fact, the appellant never made any such contention either in the State District Court or in the State Supreme Court. It was disappointed when the State Supreme Court handed down its decision and opinion holding that this cause came within the exception for which the appellees contended and which was recognized in the said case of *McBride* v. *People (supra)*, but even then, in its Petition for a Rehearing, it did not contend or assert that the said direction or command was an "order, law or statute," by which the State deprived the appellant of property without due process of law. Specification numbered VII of its Petition for Rehearing is the only one attacking the constitutionality of the Colorado Supreme Court's decision. It does so upon these grounds, and upon these grounds only, summarized as follows: (a) that the decision was upon an issue not presented; (b) that any judgment entered on the opinion "would deprive the defendant in error (appellant herein) of its private contract, properties and rights"; and (c) any such judgment would "amount to a mere arbitrary and capricious exercise of power and would be in conflict with those fundamental principles which have

been established in our system of jurisprudence for the protection and enforcement of private rights." *Neither Colorado Court has ever had the opportunity of considering the command and direction of the Board of Water Commissioners to its Treasurer as possibly being a "statute," of the State, as now contended by appellant.*

Our grounds against jurisdiction are stated in our Motion to Dismiss the Appeal, and we present them in the order therein stated.

III

Argument

1. *In the State Court there was not drawn in question the validity of any statute of the State of Colorado.*

As shown above, the appellant did not, in either of the Colorado Courts, contend that the command or direction of the Board of Water Commissioners to its Treasurer was a "statute" within the meaning of that word as it is used in Section 237(a) of the Judicial Code (U. S. C. A., Title 28, Section 344(a)). Consequently, the Colorado Courts could not, and did not, hear or determine the specific question which the appellant is now attempting to raise as a Federal question.

We submit that this Court should refuse to consider an alleged Federal right which was not, by adequate specification, called to the attention of a State Court and considered by it. In this cause there must be, but there is not, some showing that the mind of the State Court was directed to and considered the command and direction of the Board of Water Commissioners to its Treasurer as possibly being a "statute" of the State of Colorado.

Henderson v. *State of Georgia*, 295 U. S. 441, 55 S. Ct. 794, 795;

Wilson v. *Cook, Commissioner*, Nos. 328-329, October Term, 1945 (Decided March 4, 1945).

Capital City Dairy Co. v. *State of Ohio*, 183 U. S. 238, 22 S. Ct. 120, 124;

Hardy v. *State of Illinois*, 196 U. S. 78, 25 S. Ct. 176.

In this respect, appellant has been unable and has failed to comply with Subdivision 1 of Rule 12 of the Rules of this Court, providing—

> "• • • The statement shall refer distinctly to the statutory provision believed to sustain jurisdiction, (b) to the statute of the State • • • the validity of which is involved (giving the Volume and page where the statute may be found in the official edition), setting it out verbatim or appropriately summarizing its pertinent provisions • • •."

In any event, the said direction or command was not a "statue." It did not directly affect any part of the public to whom the Board offers water service, or with whom it deals, as a city department, agency or corporation. It was simply an administrative matter within the workings of the Board itself. Otherwise, every direction or order of a superior officer or employee of the Board to an inferior employee, such as a clerk, secretary or stenographer, to write a check, to write a letter or to do anything at all, might be considered a "statute." The word "statute" in Section 237 (a) of the Judicial Code is used in the sense of a legislative enactment, whether by a State Legislature or some lesser body, acting on behalf of the State in a delegated legislative capacity. It has been defined as a "legislative act in character, to which the State gives sanction." It is confined to "a (State) Constitution, an Act of the Legislature, or an Act of a subordinate instrumentality of the

State exercising delegated legislative authority, like an ordinance or an order of a Commission."

Hamilton v. *Regents of the University of California*, 293 U. S. 245, 55 S. Ct. 197.

Standard Computing Scale Co. v. *Farrell*, 249 U. S. 251, 39 S. Ct. 380;

Raymond v. *Chicago Union Traction Co.*, 207 U. S. 20, 28 S. Ct. 7;

John P. King Mfg. Co. v. *City Council of Augusta*, 277 U. S. 100, 48 S. Ct. 489.

The record herein is wholly devoid of any showing that, as specified in appellant's assignments of error, the decision of the Colorado Supreme Court was a suit "where is drawn in question the validity of any statute on the ground of its being repugnant to the Constitution."

2. *No showing that the State has deprived appellant of any property without due process of law.*

Appellant contends in its fifth, sixth and seventh assignments of error that the State has deprived it of property without due process of law contrary to Section 1 of Article XIV of the Constitution, for the alleged reason only that its Supreme Court erroneously decided this cause without reference to any Federal constitutional question. In this respect, it attempts to contend, but without avail, that the Colorado Supreme Court did not decide this case upon the law or the record before it. In this respect also it contends that the Colorado Supreme Court did not give proper heed to Section 106 (1927 Edition) of the Denver City Charter. Specification 1 of Petition for Rehearing), providing for the selection of banks in Denver for the deposit accounts of "City and County Funds," but not Water Works funds. Exhibit C, attached to appellant's statement on jurisdic-

tion). Appellant parenthetically states in its said Petition for Rehearing that the Court takes judicial notice of this Charter provision. This statement is erroneous. The law is that Colorado Courts do not take judicial notice of town or city ordinances and charters and they must be pleaded and proven (see *Fay* v. *Fort Collins*, 40 Colo. 262, 90 Pac. 912, and cases there cited). We mention this because much of appellant's statement on jurisdiction is premised upon this Charter Section being in the record and the Court's violation of it.

The City neither pleaded nor proved this Section in the District Court and it is not in the agreed statement of facts. Neither did the City offer this Charter Section in evidence. Consequently, it is not in the record of the State District Court. Quoting it in the Petition for Rehearing does not insert it in the record, upon which the Colorado Supreme Court determined this cause, and it is now improper to argue that the Colorado Supreme Court violated the appellant's rights by ignoring it.

This incident also illustrates that the appellant is aggrieved because the Colorado Supreme Court decided this cause upon the record before it, following the decisional law which it believed to be the better rule in Colorado, as well as elsewhere. Its opinion shows that it considered *Patterson* v. *People*, 98 Colo. 86, 53 Pac. (2d) 1187, and *People* v. *Koenig*, 99 Colo. 456, 63 Pac. (2d) 1235, the then two most recent Colorado cases on the rule of strict accountability, and then concluded that this cause was within the exception recognized and announced in *McBride* v. *People*, 111 Colo. 577, 144 Pac. (2d) 777. It also shows that the Court considered decisions from other jurisdictions and the three Federal cases decided in the *McBride* case (*City of Scranton* v. *Aetna Casualty & Surety Co.*, 11 Fed. Supp. 986, 22 Fed. Supp. 249, 94 Fed. (2d) 941, *Howard* v. *United States*, 87 Fed. (2d) 243, 248, and *American Surety*

Co. v. *City of Thomasville*, 73 Fed. (2d) 584). It is unnecessary to argue now that the Court's decision follows the better rule. It was, when this cause was decided in the Colorado Supreme Court, and is now the decisional rule in Colorado, arrived at after due and deliberate consideration; and in this cause is controlling on this Court, even though this Court might itself prefer some other rule.

When the Colorado Supreme Court denied appellant's Petition for Rehearing, there was no evasion of any Federal constitutional question. None had been properly presented. We believe, therefore, that jurisdiction of this Court is lacking, based upon the following quoted from *Broad River Power Co.* v. *State of South Carolina*, 281 U. S. 537, 540, 50 S. Ct. 401, 402:

> "But if there is no evasion (by the State Court) of the constitutional issue (citing cases) and the non-federal ground of decision has fair support (citing cases), this Court will not inquire whether the rule applied by the State Court is right or wrong, or substitute its own view of what should be deemed the better rule for that of the State Court."

The above is approved and quoted in *Demorest* v. *City Bank Farmers Trust Co.*, 321 U. S. 36, 64 S. Ct. 384.

Other cases, of the same purport, and holding that this Court does not have "any power to correct any supposed errors of the State Court in the determination of State law," are:

Sauer v. *City of New York*, 206 U. S. 536, 27 S. Ct. 686, 689;

Leathe v. *Thomas*, 207 U. S. 93, 28 S. Ct. 30;

Vandalia Railroad Co. v. *State of Indiana*, 207 U. S. 359, 28 S. Ct. 130, 132;

Enterprise Irrigation District v. *Farmers Mutual Canal Co.*, 243 U. S. 157, 37 S. Ct. 318, 320;

Fox River Paper Co. v. *Railroad Commission*, 274 U. S. 651, 47 S. Ct. 669, 671.

3. *The State Court's decision on purely local law is controlling upon the Federal Courts.*

The question involved being liability of a Colorado public official upon his Fidelity Bond, given pursuant to Denver's Charter provisions, it involved only local law. In determining it the Colorado Supreme Court followed the Colorado decisional law as announced in the *McBride* case and felt controlled by it. The said decisional law is equally controlling upon the Federal Courts in this controversy whether or not it be the better rule.

Erie R. Co. v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817;
Ruhlin v. *New York Life Ins. Co.*, 304 U. S. 202, 58 S. Ct. 860;
Guaranty Trust Co. v. *York*, 326 U. S. 99, 65 S. Ct. 1464;
West v. *A. T. & T. Co.*, 311 U. S. 223, 61 S. Ct. 179.

Conclusion

Believing that there is no jurisdictional ground or Federal question present upon which this appeal might be prosecuted, we respectfully submit that it should be dismissed.

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EXHIBIT 1

SECTION 297B OF THE 1927 EDITION OF THE CHARTER OF THE CITY AND COUNTY OF DENVER, COLORADO.

"Section 264D. There shall be and hereby is created a non-political Board of Water Commissioners of five members, to have complete charge and control of a water works system and plant for supplying the City and County of Denver and its inhabitants with water for all uses and purposes. • • •

• • • The Board shall have and exercise all the powers of the City and County granted by the constitution and laws of the State of Colorado and by the Charter, in the matter of purchasing, condemning and purchasing, acquiring, constructing, leasing, extending and adding to, maintaining, conducting and operating a water works system and plant for all uses and purposes, and everything necessary, pertaining, or incidental thereto. It may temporarily lease water and water rights to be used outside of the limits of the City and County of Denver when the water supply for the City and County of Denver and its inhabitants is above that necessary for its present needs; said leases, however, to be for periods not exceeding one year and to be made subject to the future needs and requirements of the City and County and its inhabitants. It shall have power in the name of the City and County of Denver to make and execute contracts necessary or incidental to the powers herein granted; and shall also in the name of the City and County of Denver institute and defend all litigation affecting its powers and duties or in relation to said water works system and plant and the property and rights connected therewith or incidental thereto.

Said Board shall have power to employ a secretary, manager, and such skilled and technical help as it may deem necessary, to serve during the pleasure of the Board, and to fix their compensation; provided it shall be the duty of the attorney for said City and County to render all legal services required by the Board. And the Board shall hire

and dismiss all other employees, subject to the right of the Civil Service Commission to examine such employees so appointed (except laborers) as to their qualifications to perform the duties for which they are appointed, and whenever such appointee is found incompetent by said Civil Service Commission such appointment shall thereafter be void; and the Board shall subject to the provisions of the Charter fix the compensation of such other employees. It shall fix the rates for which water shall be furnished for all purposes, and shall provide rules and regulations relative to the use and distribution thereof. All water rates shall be uniform as far as practicable, and as low as good service will permit, and after the bonded indebtedness is paid shall be no more than necessary to cover the cost of operation, maintenance, additions, extensions and betterments. The Board shall provide for the payment of water rates in advance, at least twice yearly, and shall provide penalties for failure to pay promptly and for non-payment.

The City and County of Denver shall annually pay into the Water Works Fund for all water supplied it for all public purposes, and the rates for the use of such water by the City and County shall not exceed the rates which were charged the City and County of Denver for said purposes by the Denver Union Water Company for the years 1917 and 1918; provided, that the City and County of Denver shall not be required to pay for water furnished it by the City Ditch for the irrigation of parks and parkways and the filling of reservoirs.

The entire cost of the operation and maintenance of said water works system and plant, including the salaries of the Board and its employees, and for additions, extensions and betterments, shall be paid from the Water Works Fund. No indebtedness created by the Board in any year shall be a charge against the revenues for any succeeding year. No money shall be expended from the revenues of said plant for additions, extensions and betterments in any year until the expense of maintenance and operation and interest on the bonds for the current year have been provided for. The board shall make an itemized monthly statement of all moneys received and paid out by it and all indebtedness incurred, a copy of which it shall file with the Auditor of the

City and County of Denver, and shall daily turn over to the Treasurer of said City and County all money received.

The Treasurer of the City and County of Denver shall open and keep a separate account for said Water Works Fund into which shall be placed all revenues received from the operation of the Water Works system and plant together with all moneys coming into said fund from other sources, and enter therein all receipts and disbursements on account thereof, and moneys shall be paid out of said fund only upon the warrants of the Board, audited by the Auditor of the City and County of Denver, except as to the bonds and the interest thereon which the Treasurer shall pay without such warrant or audit. The moneys in said Water Works Fund shall not be used other than for the management, operation and maintenance of said Water Works system and plant, including additions, extensions and betterments and for the payment into the sinking fund for the payment of interest on and the payment and redemption of the bonds, for the acquisition of a Water Works system and plant, when issued. The Treasurer shall give such additional bond conditioned in such manner as shall be determined by the Board, the premium therefor to be paid out of the Water Works Fund. The sureties on all official bonds to be given by the Board, its appointees and the Treasurer shall be responsible surety companies.

* * * * * * *

The Board shall have power to adopt rules governing its organization, the calling of special meetings and the conduct of its business. A majority of the Board shall constitute a quorum, and all action by the Board shall be taken by a majority of the Board and not otherwise.

Any and all parts of the Charter in conflict herewith are hereby repealed.

No. 984. CITY AND COUNTY OF DENVER *v.* McGLONE ET AL. Appeal from the Supreme Court of Colorado. April 22, 1946. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a properly presented federal question. *Malcolm Lindsey* and *Thomas H. Gibson* for appellant. *Walter W. Blood* and *Frank N. Bancroft* for appellees. Reported below: 163 P. 2d 646.